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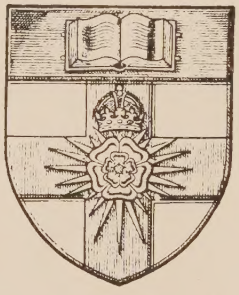

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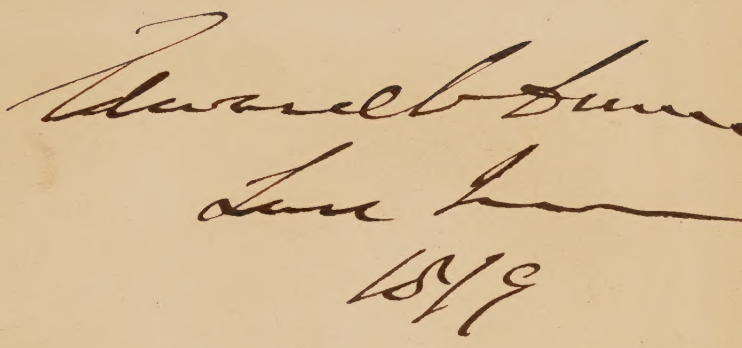

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AND

IN THE COURT OF APPEAL

BY

HENRY HOLROYD AND JOHN EDWARD HALL,
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CASES

DETERMINED BY THE

EXCHEQUER DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL FROM THE EXCHEQUER DIVISION.

XLI VICTORIA.

Distinguished. FORSYTH *v.* FORSYTH. [1948] P. 125

[IN THE COURT OF APPEAL.]

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Nov. 21.

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4 Ex D 286
289, 294

County Court—Claim indorsed on Writ reduced below 50*l.* *by payment of Money into Court—Jurisdiction to make Order that Action be tried in County Court—*30 *&* 31 *Vict. c.* 142, *s.* 7.

Where a claim indorsed on a writ originally exceeds 50*l.*, and is reduced below that sum by a payment of money into court after action brought, a judge has no jurisdiction, under s. 7 of 30 & 31 Vict. c. 142, to order that the action be tried in a county court.

Osborne v. *Homburg* (1 Ex. D. 48) approved.

ACTION commenced by issuing a writ out of the district registry at Sheffield, dated the 3rd of October, 1877, and indorsed for a claim of 57*l.* On the 5th of October, after service of the writ, the defendant paid into court 19*l.*, thereby reducing the plaintiff's claim to a sum below 50*l.* On the 10th of October the defendant entered an appearance in the district registry, and on the 12th of October took out, under s. 7 of 30 & 31 Vict. c. 142 (1), a summons calling on the plaintiff to show cause why

(1) By 30 & 31 Vict. c. 142, s. 7: "Where in any action of contract brought or commenced in any of the superior Courts of Common Law, the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it

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the action should not be tried in a county court. On that day, with the consent of both parties, the registrar made the order, but afterwards he refused to draw it up on the ground that he had no jurisdiction. The defendant then appealed to a judge at chambers, who refused to interfere, and on appeal the Exchequer Division affirmed the judge's decision, holding, on the authority of *Osborne* v. *Homburg* (1) that, where the plaintiff's claim is reduced below 50*l.* by payment into court after action brought, a judge, under s. 7 of 30 & 31 Vict. c. 142, has no jurisdiction to order the action to be tried in a county court.

The defendant appealed.

H. D. Greene, for the defendant. This case is distinguishable from *Osborne* v. *Homburg* (1), inasmuch as in that case the order was made against the wish of the plaintiff, whereas in this case the order is made by consent, both parties being willing that the action should be tried in the county court. The defendant by paying the money into court, and the parties by consenting to an order to try in the county court, have waived all objection, and given a jurisdiction to the county court.

[COTTON, L.J. The claim is not reduced within the meaning of sect. 7 by payment of money into court.

BRETT, L.J. Section 7 does not apply to cases of payment of money into court. The words are "reduced by payment, set off or otherwise." That must mean a payment, or set-off, before action.]

It is contended that the words "or otherwise" must be read as meaning payment or set-off after action. By s. 26 of 19 & 20 Vict. c. 108, a case may be remitted to a county court for trial after issue joined; in *Tomkins* v. *Beard* (2), by an order purporting

originally exceeded 50*l.*, is reduced by payment, an admitted set off, or otherwise, to a sum not exceeding 50*l.*, it shall be lawful for the defendant in the action within eight days from the day on which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to shew cause why such action should not be tried in a county court, or one of the county courts in which the action might have been commenced: and on the hearing of such summons the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly. . . . ."

(1) 1 Ex. D. 48.

(2) 18 L. T. 363.

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to be made under this statute, the case had been remitted to be tried in the county court before issue joined; but as the order had been made by consent, the Court of Common Pleas refused after verdict to entertain an application to set aside the proceedings. This shews that consent operates as a waiver of any irregularity in orders of this nature.

Forbes, for the plaintiff, was not called upon.

BRAMWELL, L.J. The appeal must be dismissed. The words of s. 7 are, "where the claim is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*" Now it is quite clear that the words payment and set-off apply to payment and set-off before action brought, and the words "or otherwise" must likewise apply to something before action, and have no application to payment into court after the writ has been issued. When we look at the earlier Act, the words are, where the claim "is reduced by payment into court, payment, an admitted set-off or otherwise." There payment into court is mentioned, and the action is remitted after issue joined. It is urged that consent has waived the objection. I do not understand what is meant by waiving the objection. In this case the registrar had no jurisdiction to make the order to try the action in a county court. The parties cannot by consent confer a jurisdiction which does not exist. I agree with *Osborne* v. *Homburg*. (1) The case of *Tomkins* v. *Beard* (2) is different and does not govern this case.

BRETT, L.J. I am of opinion that *Osborne* v. *Homburg* (1) is rightly decided. In construing s. 7 of 30 & 31 Vict. c. 142, payment means payment before writ, set-off equally means something accruing before the action, and "or otherwise" must mean something happening before action which reduces the plaintiff's claim below 50*l.* If the reduction has not happened before action, the section does not allow an order to be made, and the defect cannot be removed by any lapse of time, for it is a question of jurisdiction. It is urged that the objection is taken away by consent, but consent will not confer jurisdiction. *Tomkins* v. *Beard* (2) is different. That was a case of faulty procedure: as the objection

(1) 1 Ex. D. 48. (2) 18 L. T. 363.

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was not taken before verdict the defect was cured. In the present case no jurisdiction existed to make the order, and the appeal must be dismissed.

COTTON, L.J., concurred.

Appeal dismissed.

Solicitor for plaintiff: *Maude.*
Solicitors for defendant: *Rickards & Walker.*

May 29.

BAKER *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF PORTSMOUTH ACTING AS URBAN SANITARY AUTHORITY.

Local Government Act, 1858 (21 & 22 *Vict.* c. 98), *s.* 34—*Bye-law—Notice of Intention to Erect Buildings—Power to pull down Work done in contravention of Bye-laws.*

By the Local Government Act, 1858, s. 34, power is given to every local board to make bye-laws with respect to the level, width, and construction of new streets, the structure of walls of new buildings, the sufficiency of space about buildings, and the drainage of buildings, &c., and they may further provide for the observance of the same by enacting therein such provisions as they think necessary, as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws:—

Held, that the power to make provision as to removing, altering, or pulling down buildings was not confined to work executed in contravention of bye-laws relating to structure, but might be extended to and incorporated in bye-laws as to notice and deposit of plans.

DEMURRER to a statement of defence in an action against the defendants, as the urban sanitary authority of Portsmouth, for pulling down certain houses.

The statement of claim set out that the plaintiff was a builder, and was lessee and occupier of certain land situate in the borough of Portsmouth. The statement of claim then proceeded to allege that, in July, 1875, plans were duly deposited with the defendants, in pursuance of a bye-law, for the construction of a street or road over this land, and were duly approved by the defendants. The plaintiff commenced to build sixteen houses on the land, but he did not before commencing them deposit plans thereof. The

defendants allowed the plaintiff to commence and to proceed with the erection of the houses without complaint or interference until November, and the houses were constructed in all respects in accordance with the bye-laws of the defendants relating to the construction of buildings. On the 22nd of November, 1875, the defendants charged the plaintiff before the magistrates with having built the houses without having first deposited the plans, in accordance with the bye-laws. The plaintiff thereupon pleaded guilty, and was ordered to pay a fine of 1*l.* and costs. In December, the defendants sent workmen and pulled down twelve of the houses, and, in doing so, used so much violence that the materials were rendered almost valueless.

In the statement of defence the defendants denied these allegations, except so far as the plaintiff admitted that he had not, before commencing the houses, deposited plans thereof. Certain bye-laws had been duly made by the defendants, under and by virtue of certain statutes. (1) By the third of such bye-laws it was provided that no building should be erected by the side of any new street, or to which any new street would form the only carriage approach, until such street has been constructed to the

(1) The Public Health Act, 1848, 11 & 12 Vict. c. 63; The Local Government Act, 1858, 21 & 22 Vict. c. 98; The Local Government Supplemental Act, 1864, No. 2. The 34th section of the Local Government Act, 1858, enacts that "every local board may make bye-laws with respect to the following matters (that is to say): (1.) With respect to the level, width, and construction of new streets, and the provisions for the sewerage thereof; (2.) with respect to the structure of walls of new buildings for securing stability and the prevention of fires; (3.) with respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings; (4.) with respect to the drainage of buildings, to water-closets, privies, ashpits, and cesspools in connection with buildings, and to the closing of buildings or parts of buildings unfit for human habitation, and to prohibition of their use for such habitation: and they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws: provided always, that no such bye-law shall affect any building erected before the date of the constitution of the district." This section is repealed by the Public Health Act, 1875 (38 & 39 Vict. c. 55), but the provisions, with some additions, are re-enacted by the 157th section of that Act.

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approval of the local board. By the 32nd bye-law it was provided that every person who should intend to erect any new building should give twenty-one days' notice to the local board of such intention, such notice to be delivered to the local surveyor or left at his office, and should at the same time leave or cause to be left at the office detailed plans and sections and a block plan of such intended new building and its appurtenances, and a description of the materials of which the building is proposed to be constructed, of the intended mode of drainage, and water supply.

Bye-law 37 was as follows:—"The local board shall, by resolution or order, approve or disapprove of proposed new works or buildings within the times severally specified herein for the deposit of notices thereof; but if the owner or person intending to lay out any new street, or construct any new building, fail to give the notices herein required, or if any owner or person shall construct, or cause to be constructed, any works or buildings, or do any act, or omit to do any act, or comply with any requirement of the local board, contrary to the provisions of any or either of the hereinbefore contained bye-laws, he shall be liable for each offence to a penalty not exceeding five pounds, and he shall pay a further sum not exceeding forty shillings for each and every day during which any such works or buildings shall continue or remain contrary to the said provisions; and the local board may, if they shall think fit, at any time after the expiration of forty-eight hours from the time of the service of a notice in writing, addressed to such owner or person, signed by the local surveyor or the clerk to the local board, expressing their intention so to do, in default of such owner or person shewing good cause to the contrary in the meantime, cause any work begun or done in contravention of any or either of such bye-laws, to be removed, altered, or pulled down, as the case may require, and the expenses incurred by them in so doing shall be repaid by the offender, and be recoverable from him in a summary manner, as provided by the Public Health Act, 1848; and any such notice may be served either personally or by leaving the same with some person either at the usual or last known place of abode or business of such owner or person, or at or upon the works or buildings referred to therein."

The statement of defence then alleged that the plaintiff erected the houses in contravention of bye-laws 3 and 32. The street was a new street, and the houses were erected before the street had been constructed according to the approval of the defendants. The plaintiff did not give the defendants such notice as by the 32nd bye-law was required to be given, and did not leave, or cause to be left, at the office of the authority for their use any detailed plans or sections, or any block plans of the houses, or any description of the materials of which the houses were proposed to be constructed, or of the intended mode of drainage or means of water supply. The defendants, afterwards, upon receiving a report from their surveyor, gave the plaintiff notice, in pursuance of bye-law 37, that they would, after the expiration of forty-eight hours from the time of the service of the said notice, in default of the plaintiff shewing good cause to the contrary, cause the houses to be pulled down, as having been erected by the plaintiff in contravention of the bye-laws. The plaintiff did not, within the forty-eight hours, or before the removal of the houses, shew good cause why they should not be pulled down, and the defendants accordingly, in pursuance of bye-law 37, and of their notice, and after the expiration of the forty-eight hours, caused the houses to be pulled down, as they lawfully might. The defendants denied that in so doing any unnecessary violence was used, or that the materials were rendered almost valueless, as alleged.

To this defence the plaintiff demurred.

The issues of fact were tried at the summer assizes, 1876, at Winchester, before Blackburn, J.

It was left to the jury to say if the ground on which the houses were built was in such a state when the buildings were begun as to make it improper to build dwellings on it without previous precautions. To this the answer of the jury was in the affirmative. Damages were assessed conditionally at 500*l.*, and the jury were asked if there was neglect of duty on the part of the defendants in pulling down the houses so as to put the plaintiff to unnecessary expense. This they answered in the affirmative, and assessed the damages at 18*l.*

It was reserved to the Court to enter judgment on the findings of the jury and the demurrer.

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A motion was subsequently made on behalf of the defendants for a new trial, on the ground that the finding of the jury on which they assessed the damages at 18*l.* was against the weight of evidence, and that and the other questions came on for argument.

Cole, Q.C., *Kingdon, Q.C.*, and *Petheram*, for the plaintiff. The Local Government Act, 1858, s. 34, authorizes the making of bye-laws with respect, inter alia, "to the level, width, and construction of new streets and the provisions for the sewerage thereof." This power refers only to the streets themselves, and not to the buildings by the side of the street or road, and consequently the 3rd bye-law is bad. The 37th bye-law is in excess of the power given by the statute, for the other matters in respect of which bye-laws may be made under s. 34 are all structural. By that section they may provide for the observance of these bye-laws by regulations as to notices and as to the power of pulling down. Where bye-laws as to structural matters are contravened they can be enforced by the provisions as to pulling down buildings, but there is no power to treat in the same manner transgressions of bye-laws as to notices to which other remedies are applicable. [They referred to *Brown* v. *Local Board of Health of Holyhead* (1); *Young* v. *Edwards* (2); *Hattersley* v. *Burr* (3); *Hall* v. *Nixon*. (4)]

Thesiger, Q.C., and *Charles, Q.C.*, for the defendants. The word "street" is applicable to the buildings which stand by the roadway, the whole together forming a street: *Pound* v. *Local Board of Plumstead*. (5) Then the local board may, under s. 34, make bye-laws with respect to certain matters, and in them they may insert provisions as to notices and deposit of plans. Such provisions would thus become part of the bye-laws, and the power to remove, alter, or pull down work done in contravention of the bye-laws, is as applicable to that part which relates to notices as to any other part.

Kingdon, Q.C., in reply.

POLLOCK, B. With regard to the new trial we will consult

(1) 32 L. J. (Ex.) 25.
(2) 33 L. J. (M.C.) 227.
(3) 4 H. & C. 523.
(4) Law Rep. 10 Q. B. 152.
(5) Law Rep. 7 Q. B. 183.

Lord Blackburn. The other, which is a more important and more general question, is raised both upon the evidence at the trial and upon the demurrer. Whether the verdict for 500*l.* should stand depends on the construction to be put on the statute under which these bye-laws were made, and upon the bye-laws themselves.

The bye-laws in question are made under the Local Government Act, 1858, and the power under which they have been made is contained in the different sub-sections of s. 34 of the Local Government Act, 1858, the first of which is in these words: "With respect to the level, width, and construction of new streets, and provisions for the sewerage thereof." Next: "With respect to the structure of walls of new buildings, for securing stability and the prevention of fires." 3rd: "With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings." Then with respect to drainage and other matters, such as water-closets, and so forth. Then comes this general provision: "And they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws."

It is quite clear that the local authority, in making their bye-laws assumed two things. One is, that when they made their bye-laws with reference to the level, width, and construction of new streets, that did not merely mean they were limited to the mode in which a new road should be laid down, shewing the width of the road and the proper curve of the roadway, the paths on either side, the drains beneath, and matters of that kind. They clearly supposed they were entitled, when dealing with the words "new streets," to take the popular sense of the word "street," as meaning not only a roadway over which passengers and vehicles might pass, but also that which in popular language is part of the street, namely, the houses on both sides. It certainly seems to me that there is a great deal to be said for that construction, as

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a matter of ordinary experience and common sense; because otherwise, as was said in the course of the argument, a street might be limited to forty feet in width, and then the buildings which are on either side of that street might be such as to make it as regards proportion a worse street than the streets in London were before the Great Fire. That cannot be the intention of the Act, and as far as one can gather, it seems to me that they used those words properly when they used the words "new streets." There are a great many cases of this kind, principally under the Metropolis Building Act, and we are here not without authority, because we have the highest authority, namely, *Galloway* v. *Mayor of London* (1), where Lord Chelmsford, on motion for judgment, puts that construction on those words which I have adopted in the present case. But then another and a very material matter arises with regard to the houses themselves; and the second thing the local board assume is that they are entitled to deal, not merely with the actual construction of houses, when they are finished or partly finished, but that they are entitled to deal with that portion of the Local Government Act, 1858, which requires that any person who constructs buildings must deposit plans and sections. Now that is a matter no doubt very different from the actual construction of the building itself. It is one thing to say you must build a building, a certain structure; but another thing to say, as condition precedent to that, you must deposit certain plans and give a certain section. But when one comes to look at the thing, there again the reason of the thing tells one it is most reasonable to say you should begin your building and deposit this plan and section. It is a simple matter known to all architects and builders, and far more reasonable to ask for that deposit to be made than to say the building should be built, and then afterwards if it did not fall in with certain regulations, that it should be pulled down and destroyed. It is quite true in many cases it shifts the onus on to the builder, and in many cases it may be the local board may not be able to justify their acts with regard to the structural character of the building, because in some respects it may be they cannot exactly define whether they are things that can be made good or not. But it is evident that the position in

(1) Law Rep. 1 H. L. 34.

point of law is a clear one when they assert, "You have not deposited notices of plans and sections which ought to be deposited by you who intend to construct certain buildings." Therefore, it seems to me, as far as the reason and spirit of the Act are concerned, to come within it. But then does it come within the strict words? I listened with great attention to the argument of Mr. Petheram, who says that the whole of it is to be governed by these words: "And they may further provide for the observance of the same by enacting therein such provisions as they think necessary, as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets, or to construct buildings," and so on. But it does not seem to my mind that this is so at all, because the power is really and substantially to make bye-laws, and having made them, this section says they may make bye-laws, "As to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws." Therefore it seems to me that the power exists of making a bye-law which enables them to pull down any work begun or done in contravention of the bye-laws, whether that contravention be building contrary to the structural requirements, or building without having deposited a proper plan. In accordance with that view the 37th bye-law is made, and I think it is a perfectly good bye-law, and that what was done by the corporation in the present case was within the powers given to them by it. I will only say a word more with regard to the construction of the bye-law. It seems to me that we should deal with this on a wrong principle, if we dealt with it differently from that on which we should deal with the construction of a conveyance or an Act of Parliament. It is a case in which we should look to the general spirit and intention of the bye-laws in the same way as we should to the general spirit and intention of an Act of Parliament, giving a proper and reasonable effect to the words, and not being guided by any arguments of hardship on the one side or the other, but giving the words used an intention according to the spirit which appears in other parts of the bye-laws and in the statute on which they are founded. Several authorities were cited in this case: I do not know that they give very much assistance, but it is only right, perhaps, that I should

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allude to them. With regard to two cases, *Young* v. *Edwards* (1) and *Hattersley* v. *Burr* (2), I do not see that they at all hamper us or give us any difficulty in the decision at which we are about to arrive. But if they did, we have the case of *Hall* v. *Nixon* (3), where the matter was very fully considered; and I should adopt every word said by the learned judge in giving judgment in that case. It seems to me, therefore, that this 37th is a bye-law properly made within the power of the authority that made it.

HUDDLESTON, B. The defendants justify their act as done in pursuance of bye-law 37, and deny that any unnecessary violence was used. The main question is as to the power to make this 37th bye-law. It is said that the houses were built in contravention of two bye-laws, namely, the 3rd and the 32nd. Now that, of course, involves this proposition—had the Corporation of Portsmouth power to make those bye-laws? The only power they have to make bye-laws is by virtue of the Public Health Act, 1848, the Local Government Act, 1858, and the Local Government Supplemental Act, 1864, No. 2, and the section that applies and gives them the power more particularly is s. 34 of the Local Goverment Act, 1858. Now it is contended on the part of the plaintiffs that the powers there given are only with reference to roadways and streets and the external construction of the buildings, and a sufficient space round the buildings, and the works underground, and that they have no reference to the construction of the buildings themselves; that, therefore, the 3rd bye-law, which deals with the erection of the buildings in the street, and the 32nd bye-law, which deals with the plans with reference to those buildings in the street, are ultrà vires. The whole of this question turns on what interpretation we shall give to the words "new streets" in the 34th section. Is that to be confined to the narrow interpretation of merely the roadways, or are we to take it in the popular meaning of the words, namely, street consisting of a roadway and the houses on each side of the street? There is no interpretation clause of the Local Government Act of 1858, as applicable to street; but the Public Health Act of 1848 is incorporated with

(1) 33 L. J. (M.C.) 227. (2) 4 H. & C. 523.
(3) Law Rep. 10 Q. B. 152.

the Local Government Act of 1858, and there is an interpretation clause in the Public Health Act, 1848, to this effect: "The word street shall apply to and include any highway (not being a turnpike road) and any road, public bridge (not being a county bridge), lane, footway, square, court, alley, or passage within the limits of any district." What is the meaning of "shall apply to and include," unless "street" means something more than the roadway, that is to say, the street with the houses. That really seems the reasonable and proper interpretation of the word "street." The object of this Public Health Act is to secure not only proper roads, proper ventilation, proper means of transit through the street, but also the comfort, and I expect also the comeliness, of the buildings and of the town itself. Using the word "street" in the ordinary, I do not say popular, sense, but strictly natural interpretation, the Act provides by this first subsection that the board may make bye-laws with reference to the level, and the width, and the construction of the new streets, not merely the construction of the roadway, but the construction of the roadway plus the buildings on each side. Therefore they would have the power to make bye-laws with reference, among other things, to the time when the buildings should be erected, and the character of those buildings, and also with reference to the structure of the walls of the buildings, and the sufficiency of the space about the buildings, so that they may secure free circulation of air, and also, no doubt, what is very important, the drainage of waterclosets, and so on. Having that power "they may further provide for observance of the same,"—if I am right in the interpretation of the words "new street," that would include bye-laws as to buildings,—"by enacting therein," that is in the bye-law, "such provisions as they think necessary as to the giving of notices as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings"—well, it would be much more natural to apply "plans and sections" to the buildings than to the construction of the roadway—"plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws." Thus, the

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local board is to have power to require notices to be given, and, in default, to pull down the work begun or done in contravention of such bye-laws. And I may add, looking at the 34th section, there is a proviso that no such bye-law shall affect any building erected before the date of the constitution of the district, which implies that the bye-laws may deal with all the buildings built thereafter. If that interpretation be right the corporation had clearly power to make the third bye-law, which provides that "no building shall be erected by the side of any new street or proposed new street, which will form the only carriage approach, until such street has been constructed to the approval of the local board," and to make the 32nd bye-law, which requires the deposit of the plans; and to provide for those being carried out by providing penalties in the 37th bye-law; and to avail themselves of the power of the 34th section, to direct the houses which are built in contravention of any of the bye-laws to be pulled down. I think the corporation have shewn a justification for the acts done, with the exception of that which the jury state they did with more damage than was necessary. That we will decide hereafter, when we have heard Lord Blackburn's view of the evidence.

Judgment for the defendants on the demurrer.

Solicitors for plaintiff: *Saunders, Hawksford & Bennett.*
Solicitor for defendants: *J. Howard, Portsmouth.*

LEYMAN *v.* LATIMER AND OTHERS. 1877

June 22.

Defamation—Person convicted of Felony—Effect of enduring the Punishment—Justification—9 Geo. 4, c. 32, s. 3.

In an action by the editor of a newspaper for libel in calling him a "felon editor," the defendants justified, alleging that the plaintiff had been convicted of felony and sentenced to twelve months' hard labour. The plaintiff replied that after his conviction he underwent his sentence of twelve months' imprisonment and hard labour, and so became as cleared from the crime and its consequences as if he had received the Queen's pardon under the great seal. On demurrer:—

Held, a good reply.

Semble, that it is defamatory to call a person who has been convicted of felony "a convicted felon," if he has received a pardon or suffered his sentence.

CROSS-DEMURRERS to a statement of defence and reply. The following are the material parts of the pleadings:—

Statement of claim. 1. The plaintiff set out that he was the proprietor and editor of a newspaper called the *Dartmouth Advertiser*, and the defendants were the proprietors, printers, and publishers of a newspaper called the *Western Daily Mercury*, and that they, or some or one of them, also edited and wrote for that newspaper.

4. The defendants, in their paper of the 24th of April, 1876, wrote, printed, and published certain words, as follows:—

"The narrative must be deferred till next week. . . . The history of the *Advertiser*, too, must stand over . . . its present editor is a convicted felon. The case in which a certain John Leyman, printer, was sentenced to twelve months' hard labour for stealing feathers—a case of which Mr. Foster may have heard since he is so familiar with the chief actor—will be reproduced."

5. The defendants, in their paper of the 1st of May, 1876, wrote, printed, and published certain words, as follows:—

"There still remain to be recorded Mr. Foster's controversies with the town council of Dartmouth . . . and the facts regarding his newspaper" (meaning the plaintiff's said newspaper, the *Dartmouth Advertiser*), "and its bankrupt and felon editors" (meaning the plaintiff). "The narrative must be deferred till next week. It is worth the telling."

The plaintiff alleged that the words in paragraphs 4 and 5

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were published falsely and maliciously, and were defamatory, and he also alleged special damage.

The statement of defence, paragraph 3, denied that the word "bankrupt," in the quotation in the 5th paragraph of the statement of claim, was intended to, or did refer to, the plaintiff and continued thus:—

4. The plaintiff has been convicted of felony, and was sentenced to twelve months' hard labour for stealing feathers.

5. The words in the 4th and 5th paragraphs of the statement of claim complained of were, and are, part of certain articles printed and published in the defendants' newspaper, each of which articles was, and is, a fair, bonâ fide comment upon the conduct of the plaintiff in his public character, and as the nominal editor and proprietor of the *Dartmouth Advertiser*, a public newspaper, and was printed and published by the defendants as and for such comment, and without any malicious motive or interest whatever.

The reply, after admitting paragraph 3 of the defence, continued:—

3. As to the 4th paragraph of the statement of defence, the plaintiff (so that such admission be not in any way extended or taken to mean that he ever was, in fact, guilty of the offence referred to) admits the allegations contained in such 4th paragraph. But the plaintiff further says that he has never been convicted of felony save on that one occasion mentioned in the 3rd paragraph of the statement of defence. On that occasion he was convicted of the supposed felony by a court duly having jurisdiction in that behalf, the court of quarter sessions for the county of Cornwall, and the court, having jurisdiction as aforesaid, in the exercise of such jurisdiction, adjudged that as a punishment for the supposed felony, the plaintiff should be imprisoned and kept to hard labour for twelve calendar months. The conviction took place several years ago, and the plaintiff, as the defendants well knew, duly endured the punishment to which he was so adjudged as aforesaid for the supposed felony, and thereby became and was, and has ever since been, and is in the same situation as if a pardon under the great seal had been granted to him as to the supposed felony whereof he was convicted as aforesaid.

The plaintiff demurred to the 4th and 5th paragraphs of the statement of defence, and the defendant to the 3rd paragraph of the reply.

At the trial before Blackburn, J., without a jury, at the Exeter summer assizes, 1876, the learned judge gave judgment for the defendant on the ground that the statement meant that the plaintiff was convicted, and that it was literally true.

A rule was afterwards obtained on behalf of the plaintiff for a new trial, and came on to be argued with the demurrer.

June 13. *Cole, Q.C.*, for the defendants. The learned judge was right in saying that the statement meant that the plaintiff had been convicted. The plaintiff relies on *Cuddington* v. *Wilkins* (1), and 9 Geo. 4, c. 32, s. 3 (2), but this is not a question of status, and though the effect of the statute is to restore a felon, who has endured punishment, to the civil position that he previously held, it cannot alter the fact that at one time he was a felon. In *Gwynn* v. *South Eastern Ry. Co.* (3), it was held that the question for the jury was whether the defendants' account of the conviction was substantially correct, and the learned judge found in this case that the defamatory words were correct: see also *Alexander* v. *North Eastern Ry. Co.* (4); *Biggs* v. *Great Eastern Ry. Co.* (5)

Collins, Q.C., and *Pitt Lewis*, for the plaintiff. If the statement is not strictly accurate the plaintiff is entitled to the verdict. It is that the plaintiff *is* a "convicted felon," and a "felon editor," which is an inaccurate statement, for the plaintiff never was at the same time felon and editor. If the defendant had received a

(1) Hob. 81.

(2) 9 Geo. 4, c. 32, s. 3, is as follows:—"And whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital, who have undergone the punishment to which they were adjudged: Be it therefore enacted that where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath and shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted: Provided always, that nothing herein contained, nor the enduring of such punishment, shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony."

(3) 18 L. T. (N.S.) 738.

(4) 6 B. & S. 340; 34 L. J. (Q.B.) 152.

(5) 16 W. R. 908.

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pardon it would have cleared him from the infamy and all other consequences of his crime, and he would have had an action for a scandal in calling him felon: Hawkins' Pleas of the Crown, book ii., ch. 37, s. 48, citing *Cuddington* v. *Wilkins* (1). The infamy flows from the crime: *Rex* v. *Crosby* (2), and when that is pardoned the infamy no longer exists. Then the statute, 9 Geo. 4, c. 32, s. 3, places the plaintiff in the same position as if he had received a pardon, and the cases cited apply, and are conclusive in his favour.

Cur. adv. vult.

June 22. CLEASBY, B., read the judgment of himself and POLLOCK, B. In this case the question appears to be well raised upon the demurrer in the pleadings.

It is an action for libel, and two libels are complained of contained in the newspaper called the *Western Daily Mercury*, of the dates of the 24th of April, 1876, and the 1st of May, 1876.

If the paper of the 24th of April is considered, a different question might arise from that which does arise upon the paper of the 1st of May. It seems quite clear that the defendant is bound by what he writes on the 1st of May, without reference to what was written on the 24th of April, unless to get at the meaning of what was written on the 1st of May it is necessary to refer to what was written on the 24th of April. In the present case the letter of the 1st of May has by itself a clear meaning, and a person buying it on the 1st of May without having seen the paper of the previous week would necessarily give it that meaning. The facts of the present case, as they appear upon the pleadings, may be stated as follows, for the purpose of raising the question.

By the statement of claim the plaintiff states he was the editor of a newspaper called the *Advertiser*, and complains that on the 1st of May the defendant in his newspaper referred to the plaintiff as "the felon editor." By the statement of defence the defendant justifies this reference by alleging that the plaintiff had been convicted of felony, and was sentenced to twelve months' hard labour for stealing feathers. In his reply the plaintiff alleges that after his conviction, which took place some years ago, the plaintiff

(1) Hob. 67 & 81; see also *Celier's Case*, Sir T. Raym. 369.
(2) 2 Salk. 689.

underwent his sentence of twelve months' imprisonment and hard labour, and so became as cleared from the crime and its consequences as if he had received the Queen's pardon under the great seal. To this there is a demurrer, and so the question is raised.

In the statement of defence there was also a paragraph that the alleged libel complained of was a fair comment upon the conduct of the plaintiff in his public character as editor of the *Advertiser*, and to this there was also a demurrer in the reply. This was not argued before us, it being clear that such a justification could not be upheld in law, and upon that demurrer there must, of course, be judgment for the plaintiff.

But the other question is one of some difficulty; that question being whether a man who has been convicted of felony, and undergone his sentence, can afterwards be called a felon, without making the person calling him so liable to an action. We cannot doubt that calling a man who is the editor of a newspaper a felon editor is the same as calling him a felon. The question could not have been raised before the passing of 9 Geo. 4, c. 32. By the 3rd section of that Act it is enacted as follows:—"And whereas it is expedient to prevent all doubts respecting the civil rights of persons convicted of felonies not capital who have undergone the punishment to which they were adjudged; Be it therefore enacted: That where any offender hath been or shall be convicted of any felony not punishable with death, and hath endured or shall endure the punishment to which such offender hath been or shall be adjudged for the same, the punishment so endured hath or shall have the like effects and consequences as a pardon under the great seal as to the felony whereof the offender was so convicted: Provided always that nothing herein contained nor the enduring of such punishment shall prevent or mitigate any punishment to which the offender might otherwise be lawfully sentenced on a subsequent conviction for any other felony." The general title of the Act related to evidence, but the particular recital to this section introduces a new question—the civil status of particular persons. The question, therefore, becomes, whether a person who has committed a felony, or been convicted of a felony, and received the Queen's pardon, can be called a felon. Upon this question the authorities are clear.

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The case of *Cuddington* v. *Wilkins* (1) is as follows:—Cuddington brought an action of the case against Wilkins for calling him thief; the defendant justified, because beforetime he had stolen somewhat: The plaintiff replied that since the supposed felony the general pardon in the seventh year of the king was made, and makes the usual averment to bring himself within the pardon. Whereupon the defendant demurs: see Staundford plac., Coronæ, p. 180. That if a man arrested for felony break prison, he shall lose his battail, but yet if the king pardon him, that it is restored: F. Coronæ, p. 281; 1 & 2 E. 3 F. Coronæ, 154. So here the felony is by pardon extinct. And in the end this case was adjudged for the plaintiff, though it may be he knew him not to be within the pardon, for there is no cause to favour idle and injurious words. But perhaps if he had arrested him for the felony after pardon, it might have been excused if he knew it not, because it is an act of justice: vide Residuum, infra, fol. 81. The case is afterwards stated more fully at p. 81, when I suppose judgment was given, and after stating the facts it is said that it was adjudged for the plaintiff, for the whole Court were of opinion that though he were a thief once, yet when the pardon came it took away, not only poenam, but reatum, for felony is contra coronam et dignitatem regis, and it proceeds:—"Now when the king had discharged it, and pardoned him of it, he hath cleared the person of the crime and infamy, wherein no private person is interested but the commonwealth, whereof he is the head, and in whom all general wrongs reside, and to whom the reformation of all general wrongs belongs." And there is much more to the same effect. The case is again referred to in a later part of the same reports, four years afterwards, at p. 293, in a case of *Searle* v. *Williams* (2), where Hobart, C.J., says: "And therefore I hold, that if a man shall call him felon, or thief, he may have his action, as upon any other pardon, which we resolved in the case of *Cuddington* v. *Wilkins*." (1) Here the word felon is made use of which makes it the same as the present case.

It is unnecessary to refer to the numerous other authorities cited in the argument in support of so clear and unquestioned a decision, and one so reasonable and so just. One text-book may

(1) Hob. 67. (2) Hob. 288.

be cited, Hawkins' Pleas of the Crown, book 2, ch. 37, s. 48 (title Pardon), where in the margin the authorities are collected. He says: "As to the second general point, what is the effect of a pardon, I take it to be settled at this day that the pardon of a treason or felony, even after a conviction or attainder, does so far clear the party from the infamy and all other consequences of his crime, that he may not only have an action for a scandal in calling him traitor or felon, after the time of the pardon, but may also be a good witness notwithstanding the attainder or conviction; because the pardon makes him as it were a new man, and gives him a new capacity and credit."

The conclusion is inevitable, therefore, that if calling the plaintiff a felon editor involves the calling him a felon, the plaintiff is entitled to his action, and there must be judgment for the plaintiff upon the demurrer to the reply.

It is not necessary to decide what would have been the result it the defendant had only said of the plaintiff as he does in the first letter—"he is a convicted felon."

In that case there would be more doubt in the absence of any decided case as to the effect of these words; and it might be said, if you choose to read the words favourably for the defendant, that they only mean "he has been convicted of felony." But it rather seems to us they ought not to be read so favourably, and that the result ought to be the same. It is not true to say of the plaintiff that he is a convicted felon; he is a convicted felon who is in the position of a pardoned felon, and the felony is at the time extinguished. The calling him a felon, and attaching the infamy of felony to him, would import that he had not been pardoned. It would have been a different matter if the defendant had written of the plaintiff that he had formerly committed a felony or been convicted of felony. That would have been strictly true, and could have been justified, although the fact of the sentence having been suffered was withheld. At least such is our opinion, and the distinction is taken in the case of *Cuddington* v. *Wilkins* (1), at page 82 of the report. The distinction is not a verbal one merely, but the two statements would have a different effect. A man stating that another was a felon would be listened to as in-

(1) Hob. 67.

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forming his hearers that the man was infamous and to be shunned, but a man who stated that another man (perhaps the editor of a newspaper, and in a respectable position), had been convicted of a felony twenty or thirty years ago, would probably himself be more condemned than the man he spoke of. But, however small the distinction may be, a slanderer should take care to be within the truth. The Court says in the case of *Cuddington* v. *Wilkins* (1), where the distinction is taken, "There is no cause to favour idle and injurious words." The cases are numerous in which the injurious statement has gone beyond the truth, and has been considered actionable.

The case came on for trial before Mr. Justice Blackburn, at the Exeter summer assizes. It was intended to be a jury trial, but there was no jury to be had. The facts had all come out in a previous trial, and the learned judge expressed (for the benefit of the parties) his intention to direct a verdict for the defendant if the case was tried. The case was then taken for convenience before the judge without a jury, and the following is the judgment as reported by his Lordship:—"I think that the statement in the newspaper means that he was convicted, and is literally true, and therefore the plaintiff cannot recover damages. I shall give judgment for the defendant with costs on the 4th day of next sittings." This was done, no doubt, to enable the plaintiff to apply to the Court, and an application was accordingly made, and the case was argued before my Brother Pollock and myself. Having regard to the authorities referred to, we cannot think the learned judge was correct in saying that the statement should be read as a statement that the plaintiff had been convicted, and was literally true. The reasons have been already given. It appears to us that judgment ought to be given for the plaintiff on the demurrers, and that there should be a new trial, for the purpose chiefly of assessing the damages which the plaintiff might take as he was advised on the two libels, or on that of the 1st of May.

Judgment for plaintiff.

Solicitors for plaintiff: *Coode, Kingdon, & Cotton, for John Daw & Son, Exeter.*

Solicitors for defendants: *Surr, Gribble, & Dunton, for J. W. Wilson, Plymouth.*

(1) Hob. 67.

KNOWLES & SONS, LIMITED, APPELLANTS; McADAM, SURVEYOR OF TAXES, RESPONDENT.

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Dec. 5.

Income Tax—Mines and Minerals—Balance of Profits or Gains—Deduction for exhausted Capital—5 & 6 Vict. c. 35, *s.* 100; *Sch. D., Rules* 1, 3; *s.* 159—29 *&* 30 *Vict. c.* 36, *s.* 8.

A colliery company bought freehold and leasehold coal mines, and raised some of the coal and sold it. At the end of the first year's working, the mines, by reason of the coal gotten during the year, were worth 10,424*l.* less than the price for which they were bought. The company, being assessed to the income tax under Sched. D in respect of the profits of their business as colliery proprietors for that year, claimed to deduct 10,424*l.* for exhausted capital:—

Held, first, that by virtue of 29 & 30 Vict. c. 36, s. 8, the mines were assessable under Sched. D of 5 & 6 Vict. c. 35, s. 100, and not under Sched. A; secondly, that in estimating "the full amount of the balance of the profits or gains" of the business under the 1st rule of Sched. D, the deduction ought to be made, and that it was not one of the deductions forbidden by the 3rd rule of Sched. D or by s. 159.

CASE stated by the commissioners for the special purposes of the Income Tax Act, under 37 Vict. c. 16.

At a meeting of the commissioners for special purposes, held at Somerset House, on the 17th of December, 1875, for the purpose of hearing appeals under the Income Tax Act for the year ending the 6th of April, 1875, the appellants, a company carrying on business as colliery proprietors at Pendlebury and elsewhere, appealed against an assessment in the sum of 226,824*l.* made on them under Sched. D of 16 & 17 Vict. c. 34, in respect of the profits of their business as colliery proprietors.

At the hearing of the appeal the commissioners were of opinion that the assessment should be reduced to the sum of 216,827*l.*, but it was urged on behalf of the company that a sum of 10,424*l.* should be deducted, on the ground that in estimating the amount of assessable profits the commissioners ought to allow as a deduction that sum which was claimed by the company as "depreciation," and which, as stated in the annual report for the year ending the 31st of December, 1874, is "based on a calculation of the extent of coal available, and the duration of existing leases, but it may be modified as future circumstances require." It was further explained that the term "depreciation" in the

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balance-sheet was used to shew to the shareholders the deterioration or difference in the value of their property at the end of the year, and after working out of a year's coal, and the expiration of a year of their leases, as compared with the value of such property at the beginning of the year; or, in other words, that a revaluation of the property shewed that it was worth at the end of the first year 10,424*l.* less than at the time of the purchase twelve months before.

The commissioners were of opinion that they were precluded by the 3rd rule applicable to the first case of Sched. D, in s. 100 of 5 & 6 Vict. c. 35, and by s. 159 of that Act, from allowing the deduction claimed, and confirmed the assessment in the sum of 216,827*l.*

The above case was thereupon, at the request of the company, stated by the commissioners, and was partly argued before the Exchequer Division (Cleasby and Pollock, BB.) on the 24th of January, 1877, when the Court desired that the commissioners should state more clearly the circumstances under which the deduction in respect of the 10,424*l.* was claimed. The commissioners accordingly stated the following addenda.

The company's colliery property comprises both freehold and leasehold mines, which were purchased by them, the price paid for the leasehold coal mines, subject to an average royalty rent of 7*d.* per ton, and having an average of thirty-two years to run, being 717,421*l.*; the purchase-money for the freehold mines being 67,550*l.*

At the end of the first year's working, which is the year of the assessment in question, it was ascertained that from the company's leasehold collieries 844,877 tons, and from their freehold pits 62,000 tons of coal had been wrought or gotten and sold in that year,—the total quantity, therefore, being 906,877 tons.

The appellants allege that in ascertaining, by a correct and accurate balance-sheet, the profits made in that year, they valued their coal mines at 10,424*l.* less than the sum for which they had purchased them at the commencement of that year, which sum (as the appellants allege) fairly represented the diminution in their value by reason of the coal gotten as above mentioned, and which sum, for the purposes of such balance-sheet, was technically, but

perhaps incorrectly, referred to as depreciation. Of the sum of 10,424*l.*, the sum of 721*l.* 17*s.* 11*d.* represents the diminution in the value of the freehold mines, and the balance that of the leasehold.

The appellants further allege that, in ascertaining the profits of the freeholds, no sum is set against or deducted from the gross receipts on account of any rent assumed to be paid in respect thereof.

Herschell, Q.C. (*T. J. Saunderson* with him), for the appellants. The tax is assessable under 5 & 6 Vict. c. 35, s. 100, Sched. D, coal mines having been transferred from No. III. Sched. A to Sched. D, by virtue of 29 Vict. c. 36, s. 8. (1) "The balance

(1) Sched. D of 5 & 6 Vict. c. 35, s. 100, contains the following enactments:—"1st Case. Duties to be charged in respect of any trade, manufacture, adventure or concern in the nature of trade, not contained in any other schedule of this Act.

"RULES.

"1st. The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, or concern, upon a fair and just average of three years . . . .

"3rd. In estimating the balance of profits and gains chargeable under Sched. D, or for the purpose of assessing the duty thereon, no sum shall be set against or deducted from, or allowed to be set against or deducted from such profits or gains, on account of any sum expended for repairs of premises occupied for the purpose of such trade, manufacture, adventure or concern, nor for any sum expended for the supply of repairs or alterations of any implements, utensils, or articles employed for the purpose of such trade, manufacture, adventure or concern beyond the sum usually expended for such purposes according to an average of three years preceding the year in which such assessment shall be made; nor on account of loss not connected with or arising out of such trade, manufacture, adventure or concern; nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade, manufacture, adventure or concern; nor for any capital employed in improvement of premises occupied for the purposes of such trade, manufacture, adventure, or concern; nor on account or under pretence of any interest which might have been made on such sums if laid out at interest; nor for any debts except bad debts proved to be such to the satisfaction of the commissioners respectively; nor for any average loss beyond the actual amount of loss after adjustment; nor for any sum recoverable under an insurance or contract of indemnity."

Sect. 159 enacts "That in the computation of duty to be made under this Act in any of the cases before mentioned either by the party making or delivering any list or statement required as aforesaid, or by the respective assessors or commissioners, it shall

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of the profits or gains" of a year's trading cannot be ascertained without taking stock at the beginning and end of the year. If a coal merchant at the beginning of the year buys at the price of 1*l.* a ton 10,000 tons of coal which is already brought to the surface of the earth, and sells thereof during the year 1000 tons for 1500*l.*, his balance of profit is not the whole 1500*l.*, but 500*l.*, the difference between what he paid and what he sold the 1000 tons for. This will not be disputed. What difference can it make in principle if the coal which the merchant buys is aboveground or underground? It is on this principle that the deduction in the present case is claimed. Instead of having 10,000 tons left at the end of the year, the coal merchant has only 9000 tons; and instead of having all the coal in the mine as originally bought, say one million tons, the colliery company have only the one million less the 100,000 tons raised and sold during the year. The company must deduct the price which they paid for the 100,000 tons from the price at which they have sold them. The difference (after deducting the expenses of working, which are not in question) will be the balance of profit for the year. Suppose

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not be lawful to make any other deductions therefrom than such as are expressly enumerated in this Act; nor to make any deduction on account of any annual interest, annuity or other annual payment to be paid to any person out of any profits or gains chargeable by this Act, in regard that a proportionate part of the duty so to be charged is allowed to be deducted on making such payments; nor to make any deduction from the profits or gains arising from any property herein described, or from any office or employment of profit, on account of diminution of capital employed or of loss sustained in any trade, manufacture, adventure or concern, or in any profession, employment, or vocation."

By s. 8 of 29 & 30 Vict. c. 36: "The several and respective concerns described in No. III. of Sched. A of 5 & 6 Vict. c. 35, shall be charged and assessed to the duties hereby granted in the manner in the said No. III. mentioned, according to the rules prescribed by Sched. D of the said Act, so far as such rules are consistent with the said No. III. . . . ."

No. III. of Sched. A of 5 & 6 Vict. c. 35, contains "Rules for estimating the lands, tenements, hereditaments or heritages hereinafter mentioned which are not to be charged according to the preceding general rule.

"The annual value of all the properties hereinafter described shall be understood to be the full amount for one year, or the average amount for one year, of the profits received therefrom within the respective times herein limited. . . . .

"2nd. Of mines of coal, . . . on an average of the five preceding years, subject to the provisions concerning mines contained in this Act."

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the company sell the 100,000 tons for less than the price at which they bought them, then, if the contention of the Crown be right, the company must pay the tax on the price at which they sold, though on the year's trading there has been a balance of loss, not profit. The argument of the Crown involves this consequence, that if a man buys or succeeds by inheritance to a stock of coal above-ground, or a mine below-ground, and sells the whole within the year, he must pay the tax upon the net proceeds, though the whole of his capital is exhausted. In such a case he is entitled to deduct from his net proceeds the market value of the stock of coal, or the mine, at the time at which he acquired it. "What we call a mineral lease is really, when properly considered, a sale out and out of a portion of land": per Lord Cairns, *Gowan* v. *Christie.* (1) Suppose at the end of the leasehold term this company has worked and sold the whole of the coal for less or exactly the same amount as they paid for it, there will have been no profit, and yet, according to the Crown, the company will have been taxable every year upon the amount of the net proceeds. In construing the statute, allowance must be made for wasted or exhausted capital before computing profit. This is the doctrine of all political economists. "Profits really consist of the produce or its value remaining to those who employ capital in industrious undertakings, after all their necessary payments have been deducted and after the capital wasted or used in the undertakings has been replaced. If the produce derived from an undertaking, after defraying the necessary outlay, be insufficient to replace the capital expended, a loss will have been incurred; if the capital be merely replaced, and there is no surplus, there will neither be loss nor profit." McCulloch's Principles of Political Economy, 4th ed. chap. vii. p. 530.

Dicey, for the respondent. It is an error to suppose that s. 8 of 29 Vict. c. 36, transfers mines from No. III. Sched. A to Sched. D; it only directs that in some respects they shall be assessed in the same way as if they were under Sched. D. The appellants' doctrine as to computing profit is correct from the point of view of political economy, but the Income Tax Act disregards the doctrines of political economy. The tax, though in fact it has continued for

(1) Law Rep. 2 H. L., Sc. at p. 284.

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several years, has always been imposed in theory and in language for one year only, and it is intended to get from all a proportion of their "income" for that year. Mines are assessable under Sched. A, s. 60, of 5 & 6 Vict. c. 35, as "lands, tenements, and hereditaments," and upon their "annual value," not upon a balance of profits. But assuming they are brought under Sched. D, then this deduction is expressly forbidden by the words of the 3rd rule, "nor on account of any capital withdrawn therefrom; nor for any sum employed or intended to be employed as capital in such trade," &c.; and by s. 159. The present deduction is really on account of money set aside for depreciation of capital, and that has been held not allowable: *Forder* v. *Handyside*. (1) That decision concludes the question.

Herschell, Q.C., was not heard in reply.

KELLY, C.B. I have not had the advantage possessed by my learned Brothers of hearing this case argued on the previous occasion, but when I consider the nature of the tax and of the case before us I entertain no doubt upon the matter.

First, it is quite clear that s. 8 of 29 Vict. c. 36 transfers the present case from Sched. A to Sched. D. Now the 1st rule of Sched. D says: "The duty to be charged in respect thereof"—that is, "of any trade, manufacture, adventure or concern in the nature of trade," which includes the business of a colliery company formed for the purpose of working coal mines—"shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade, manufacture, adventure or concern upon a fair and just average of three years," and so on. That is the substantive enactment, the construction of which must decide the present question, unless it is qualified by something which comes after. Now what is "the balance of the profits or gains?" Take the simplest case. A man buys a bale of cotton for 20*l.* and sells it again for 25*l.*, no expenses being incurred except the price of the bale. His balance of profit is 5*l.*, which remains to him after having repaid himself everything he paid to obtain the bale. Let us go further and suppose a man buys a bale of cotton for 20*l.*, and obtains by a legacy a chest of tea the market value of which is

(1) 1 Ex. D. 233.

20*l.*, and sells the two for 45*l.* Is not his profit the 5*l.* only? If his profit is 25*l.*, then there is no escape from the proposition that, where a man succeeds by inheritance to a property and sells it, the price he receives is taxable as income. Suppose a merchant dies and bequeaths to his son a warehouse containing 20,000 bales of cotton. The son carries on the trade and sells 1000 of those bales. Is his profit what he receives for those bales without any deduction? No, his profit is the price at which he sells less the price he has paid for what he sells, or, if he has not bought it, less what he would have had to pay if he had bought it.

Apply this principle to the case of a coal mine. Suppose a man pays 1000*l.* for a lease of the mine for one year only. At the end of the year he has got all the coal in the mine and sold it for 1200*l.*, the expenses of labour and materials being 100*l.* Is his profit 1100*l.*? It would be an abuse of language to say so. His profit is what remains in his pocket after deducting the expenses, namely 1000*l.* for the liberty to get the coal and 100*l.* for the cost of getting it. That is, his profit is 100*l.* only.

Now if that be true in the case of a lease for one year, it must be true in the present case, where the leases have an average of thirty-two years to run, and where the lessees get a portion of the coal year by year. There can be no difference in principle. Upon the construction, therefore, of the 1st rule of Sched. D I think there can be no doubt the deduction claimed ought to be allowed.

Then it is said that the deduction is forbidden by the words of the 3rd rule, "nor on account of any capital withdrawn." Those words do not touch the present case. They would apply to a case where a man has a capital of say 40,000*l.* in a coal mine, and withdraws 1000*l.* thereof in order to build a coal warehouse, or some such purpose. That portion of capital so withdrawn must not be deducted before computing the profits of the year in question. And there are various other ways in which capital may be withdrawn which would not be an element in estimating the balance of profits. Then there are other words in the 3rd rule, "nor for any sum employed or intended to be employed as capital in such trade," &c. Those words, I think, refer to additional capital which a man puts into his business.

Then we come to s. 159, which enacts that it shall not be lawful

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to make any other deductions than such as are expressly enumerated in the Act, "nor on account of any diminution of capital employed or of loss sustained in any trade," &c. Those words, "diminution of capital," do not apply where a man sells an article which he purchased, but where, for instance, his capital is diminished by his goods being destroyed by fire, or where having invested 20,000*l.* in one business he withdraws 5000*l.* and invests it in some other business. In neither of those cases is the diminution of capital an element in computing the balance of profit.

I think, therefore, that the present deduction does not come within any of those forbidden by the statute, and that the appellants are entitled to judgment.

CLEASBY, B. The present case, involving the application of the rules for assessing the income tax, is of a class in which one must look at each case and be careful not to generalise, so as to include other and different cases. This is not the case of an owner of land opening a quarry or mine, and either working it himself or letting it upon a royalty, and it must be understood, so far as I am concerned, that I am not deciding that case.

Now, I take it to be quite clear that in the present case s. 8 of 29 & 30 Vict. c. 36, places the assessment under "the rules prescribed by Sched. D" of 5 & 6 Vict. c. 35. The words are, "so far as such rules are consistent with" No. III., Sched. A, of 5 & 6 Vict. c. 35. Unless this enactment applies to the case of a colliery company formed for the purpose of carrying on the business of working coal mines, no case can be suggested to which it would apply. If the case be put of an owner of land opening a quarry and working or letting it, it may possibly be that such a case comes under Sched. A, but as to that I give no opinion. It being clear that this colliery company comes under Sched. D, we have only to apply the words of Sched. D treating it as a trade or business. As soon as we get to this point the case is free from difficulty. The 1st rule of Sched. D says: "The duty to be charged in respect thereof shall be computed on a sum not less than the full amount of the balance of the profits or gains of such trade," &c. You cannot get at the balance of the profits or gains without taking stock at the beginning and end of the year.

This is the necessary meaning of the 1st rule. This was hardly disputed, but the case was said to come under the 3rd rule, and the whole argument turns on that. If there be anything in the 3rd rule which is applicable we are bound to apply it, however inconsistent it may seem with the general idea of "the balance of the profits or gains." But there is nothing in the 3rd rule inconsistent with the idea of stocktaking. It is quite unnecessary to go through all the various items mentioned in the 3rd rule. It is enough to say that this is not a case of "capital withdrawn" from the concern; it is a case of capital consumed in making the profits.

With regard to *Forder* v. *Handyside* (1), the principle of the income-tax is that you must take the result of the trading of a year or of an average of years, and that you cannot put by a sum of money for depreciation of capital in addition to the deduction allowed for repairs. If you did you would depart from the principle of the tax, and the Act expressly provides against it. I almost wonder that that case was argued at all, but it has nothing whatever to do with the present case.

I think, therefore, that the appellants are entitled to judgment.

POLLOCK, B. I entirely concur. The question has arisen through a misapprehension caused by the company in the first instance using the word "depreciation." Now that the nature of the deduction has been explained, it is clear it is one which must be made before "the balance of profits" is computed.

Judgment for the appellants, with costs.

Solicitor for appellants: *H. T. Chambers.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

(1) 1 Ex. D. 233.

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Nov. 23.

WEIR *v.* BARNETT AND OTHERS.

Company—Fraudulent Prospectus—Liability of Directors for fraudulent Statement of Agent—Principal and Agent.

A company which had been formed to work a mine having been compelled to cease working for want of funds, money was advanced to the company by some of the directors, and among them by Barnett and Baldwin. Afterwards at a general meeting of the company held in order, inter alia, to provide for the existing deficit and for working expenses, the directors were authorized by the meeting to issue debentures on such terms and for such amount as they in their discretion might think fit. The directors accordingly authorized the secretary to employ a firm of brokers to place the debentures. The brokers prepared and issued a prospectus, bearing the names of Barnett and Baldwin and of Bell and others as directors, and containing statements as to the condition and prospects of the company, on the faith of which the plaintiff and others subscribed and paid for debentures. The money thus raised was paid to the company's bankers, and part of it was applied by the directors on behalf of the company to repay the advances made by Barnett and Baldwin. The debentures having become worthless the plaintiff brought an action for damages against Barnett, Baldwin, and Bell, in respect of the statements in the prospectus, some of which were alleged to be fraudulent.

The jury found as to all three defendants that the prospectus contained statements of fact which were false to the knowledge of the brokers, and by which the plaintiff was induced to part with his money; that none of the false statements were made by Barnett or Baldwin or Bell personally, or by the authority of either, but that the statements were within the authority of the brokers as agents. As to Barnett (who had been absent from England while the debentures were being issued) the jury found that he had left authority to the directors to cause a prospectus to be issued to raise money on debentures, but not to make any false statements; that it was within the scope of their authority to issue a prospectus, but such only as the draft which Barnett had prepared before he left England, and which contained no false statements; that Barnett received benefit from the fraud of the brokers, viz., the repayment of the money advanced by him to the company, but without knowledge of the fraud. As to Baldwin the jury found that he received benefit from the fraud; which the Court took to mean that, though he was not aware of the false statements contained in the prospectus before it was issued, he became aware of them before he was repaid the money which he had advanced to the company. As to Bell the jury found that he received no benefit. Upon these findings:—

Held, that the brokers were really the agents not of the directors but of the company, the directors being intervening agents, and that the finding of the jury upon this point was contrary to the evidence; that the repayment of the moneys to Barnett and Baldwin, though in some sense consequent upon, had no necessary connection with the fraudulent statements in the prospectus; that Barnett and Baldwin were not the principals of the brokers, so as to bring the former within the rule that a principal is answerable where he has received a benefit from the fraud of an agent acting within the scope of his authority; and that judgment must, therefore, be entered as well for Barnett and Baldwin as for Bell.

THIS was an action against six directors of a company incorporated in 1872 under the Companies Acts, 1862 and 1867, for

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damages sustained by the plaintiff who had subscribed and paid for debentures of the company, upon the faith of certain statements in a prospectus issued by the authority of the defendants, some of the statements being alleged to be false and fraudulent to the knowledge of the defendants. The debentures had since become worthless.

The facts proved at the trial at Westminster before Huddleston, B., the findings of the jury, and the questions arising thereon, are stated in the judgment.

April 27, 28, 30; May 3, 4, 7. *Sir H. S. Giffard, S.G.*, *A. Charles, Q.C.*, and *W. Barber*, for the plaintiff, moved to enter judgment against the defendants Barnett and Bell, and opposed motions to enter judgment for the defendant Baldwin, and for a new trial as to the defendant Dymes.

The principle which governs this case was laid down by Parke, B., in *Cornfoot* v. *Fowke* (1): "It must be conceded that if one employ an agent to make a contract, and that agent, though the principal be perfectly guiltless, *knowingly* commit a fraud in making it, not only is the contract void, but the principal is liable to an action. Lord Holt held that in an action of deceit for selling one sort of silk for another, upon evidence that there was no actual deceit in the defendant, but that it was in his factor beyond sea, the merchant was liable": *Hern* v. *Nichols*. (2) This principle was upheld in *Udell* v. *Atherton* (3) by Pollock, C.B., and Wilde, B. To make the principal liable the fraud must be committed by the agent acting within the scope of his authority: *Coleman* v. *Riches* (4); and in the present case Stewart & Lambe were acting within the scope of their authority. The finding of the jury, that they were the agents of the defendants, is amply justified by the evidence. In *Barwick* v. *English Joint Stock Bank* (5) the judgment of the Exchequer Chamber, delivered by Willes, J., pointed out that the difference of opinion in *Udell* v. *Atherton* (3) arose "not so much upon the question whether the principal is answerable for the act of an agent in the course of his business—

(1) 6 M. & W. at p. 373; 9 L. J. (N.S.) Ex. at p. 302.

(2) 1 Salk. 289.

(3) 7 H. & N. 172; 30 L. J. (Ex.) 337.

(4) 16 C. B. 104; 24 L. J. (C.P.) 125.

(5) Law Rep. 2 Ex. at p. 265.

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a question which was settled as early as Lord Holt's time—but in applying that principle to the peculiar facts of the case . . . The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." That case decided that a banking company is liable for the fraudulent representation of its manager made in the course of conducting the business of the company. That decision was followed in *Swift* v. *Winterbotham* (1), and was not in any way impugned by *Swift* v. *Jewsbury* (2), see per Lord Coleridge. The effect of these cases and of the decision in *Western Bank of Scotland* v. *Addie* (3) was explained in *Mackay* v. *Commercial Bank of New Brunswick* (4), where the Court distinctly approved the general rule laid down in *Barwick* v. *English Joint Stock Bank.* (5) It is not necessary to shew that the defendants knew the false statements to be false. They employed others to make statements in their names without taking the trouble to ascertain what statements were made, and that is enough to make them liable, per Lord Cairns in *Reece River Silver Mining Co.* v. *Smith* (6): "I think it may be quite possible, as has been alleged, that the directors were ignorant of the untruth of the statements made in their prospectus. But I apprehend it to be the rule of law that if persons take upon themselves to make assertions as to which they are ignorant whether they are true or untrue, they must in a civil point of view be held as responsible as if they had asserted that which they knew to be untrue." Nor is it necessary to shew that they received benefit: *Bayley* v. *Manchester, Sheffield, and Lincolnshire Ry. Co.* (7), though in the present case those of the directors who had advanced money did receive benefit by the repayment of their advances; and it was for that purpose among others that the false statements were made. Judged by the rule laid down by Lord Chelmsford in *Directors, &c., of Central Railway Company of Venezuela* v. *Kisch* (8) the defendants are liable. It is no answer to say that Stewart &

(1) Law Rep. 8 Q. B. 244.
(2) Law Rep. 9 Q. B. at p. 312.
(3) Law Rep. 1 H. L., Sc. 145.
(4) Law Rep. 5 P. C. at p. 412.
(5) Law Rep. 2 Ex. 259.
(6) Law Rep. 4 H. L. at p. 79.
(7) Law Rep. 7 C. P. 415.
(8) Law Rep. 2 H. L. at p. 113.

Lambe were agents of the company, for they were also agents of the defendants. The Court cannot enter judgment for the defendants without laying down the novel and startling doctrine that, if directors authorize brokers or accountants to issue a prospectus bearing the names of the directors, and the brokers publish a false and fraudulent prospectus, the directors may save themselves from all liability by taking care not to know what is in the prospectus.

Morgan Howard, Q.C., and *Romer*, for the defendant Barnett, were not heard.

Day, Q.C., and *Petheram*, for the defendant Baldwin, moved to enter judgment for him, and cited *Henderson* v. *Lacon* (1) and *Land Credit Company of Ireland* v. *Fermoy*. (2)

A. L. Smith, for the defendant Dymes, contended that the verdict was against the weight of the evidence.

Digby Seymour, Q.C., and *Lumley Smith*, for the defendant Bell, moved to enter judgment for him.

[The arguments urged for the defendants sufficiently appear in the judgment.]

Sir H. S. Giffard, S.G., in reply. The defendants were more than mere transmitters of authority to make statements; they had a personal interest in the thing to be done, and are as much liable as if they had made the false statements themselves: *Sands* v. *Child* (3), *Bennett* v. *Bayes* (4), and *Cullen* v. *Thomson*. (5)

Cur. adv. vult.

Nov. 23. The judgment of the Court (Kelly, C.B., Pollock and Huddleston, BB.) was read by

KELLY, C.B. The plaintiff in this action claims to recover from six defendants damages which he alleges he sustained by reason of certain false statements, contained in the prospectus of a company called "The Knightor, Treverbyn, and Resugga Hæmatite Iron Ore Mining Company, Limited," of which the defendants were directors. At the trial which took place before Huddleston, B., on the 27th of April, 1876, and eleven following days, a

(1) Law Rep. 5 Eq. 249, at. p. 261.
(2) Law Rep. 5 Ch. 763.
(3) 3 Lev. 351.
(4) 5 H. & N. 391; 29 L. J. (Ex.) 224.
(5) 4 Macq. H. L. 424.

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verdict and judgment passed against the defendant Furnival and for the defendant Siddens, and there having been no motion as to these two defendants, no further question arises.

As to the defendant Barnett the jury found a verdict in his favour, leave being reserved to move to enter a verdict for the plaintiff.

A verdict passed against the defendant Baldwin with leave to move, and against Dymes with no leave.

As to Bell the verdict was in his favour, with leave to the plaintiff to move.

Motions were made in accordance with the leave so reserved; also upon the ground that the verdict was against the weight of the evidence. The evidence at the trial was very lengthy, and a great many points were made before us upon the argument of the rules, but the following are the only facts which, it appears to us, are necessary to the proper understanding of the points of law which really arise.

The company, of which the defendants were directors, having been formed for the working of an iron mine in Cornwall, were compelled in January, 1873, to cease working for want of funds. Between that time and August, 1873, money was found and advanced to the company by the defendants Barnett, Baldwin, Furnival, and Dymes, and a small quantity of ore was raised. On the 1st of August, 1873, at an extraordinary general meeting of the company, held in order, inter alia, to provide for the existing deficit, and for working expenses, the directors were authorized by the meeting to issue debentures on such terms and for such amount as they in their discretion might think fit. In accordance with this resolution several meetings of the directors, at which the defendants or some of them were present, were held, and on the 29th of September, 1873, at the annual general meeting, the directors were again authorized by the meeting to issue debentures. Subsequently to this the directors met occasionally, and endeavoured and continued their endeavours to issue debentures, and at one of these meetings, held on the 8th of October, an agreement was entered into between the defendants Baldwin, Furnival, Dymes, and the company, that Baldwin and Furnival should make further advances for taking up certain bills, and that

the repayment of these sums and of the previous amounts advanced by the defendants should be made out of the proceeds of any debentures that might be issued.

This agreement was signed also by an agent of the defendant Barnett, he being absent from England. After this date debentures to a small amount were issued through Messrs. Marchant, brokers, who were employed by the company for that purpose, and on the 5th of November, at a meeting at which the defendants Baldwin, Bell, Dymes, and Furnival were present, the authority to Messrs. Marchant was rescinded, and it was resolved that the secretary be authorized "to employ brokers to place debentures to produce 10,000*l.* at a discount of 5 per cent., and a commission not exceeding 12 per cent." Under this authority the secretary, on behalf of the company, employed Messrs. Stewart & Lambe, who were brokers and public accountants, to place the debentures, and they, without any express authority, issued the prospectus complained of, which was prepared by their clerk, and contained the names of the defendants as directors. It set forth statements as to the condition and prospects of the company, some of which were found by the jury to be false. On the faith of the statements contained in this prospectus the plaintiff and others took debentures and paid for them. The money so obtained was paid into the bankers of the company, and a portion of it was applied by the directors, on behalf of the company, to the repayment of the advances made by the defendants, Barnett, Baldwin, Furnival, and Dymes, in accordance with the agreement of the 8th of October. The company continued to exist till January, 1875, when it was wound up.

The defendant Barnett left England for South America upon the 15th of August, 1873, and did not return until the spring of 1874. Before leaving he made a sketch for a prospectus, which he delivered to the secretary. This contained no statements but what were true. The repayments of the money advanced by him were made to his agent during his absence and without his knowledge.

The different circumstances of the case, as applicable to each of the defendants, were pointed out to the jury by the learned judge, and in the result they found as follows:—

As to the defendant Barnett, that none of the statements con-

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tained in the prospectus which were alleged to be false, were made by him personally or by his authority, but that the prospectus contained three statements of fact which were false to the knowledge of Stewart & Lambe; that the plaintiff was induced to part with his money by means of these statements; that the statements were within the scope of the authority of Stewart & Lambe as agents; that Barnett, when he left England, left authority to the directors to cause a prospectus to be issued in order to raise money on debentures, but not to make any false statements; that it was within the scope of their authority to issue a prospectus, but such only as the draft which Barnett had prepared, and which contained no false statements. They also found that Barnett received benefit from the fraud of Stewart & Lambe, but without knowledge of the fraud. The benefit referred to was in fact the repayment to him, out of the funds raised by the debentures, of the advances made by him to the company. Baron Huddleston reports that he sees no ground to be dissatisfied with the findings of the jury, and we agree with him. The question which next, however, arises is, taking the findings of the jury as conclusive in fact, what judgment ought to be entered; and in considering this it will be convenient to take the case of Barnett first, reserving the findings as to the other defendants and the observations which arise upon them to be dealt with separately.

It is clear that Barnett personally was guilty of no fraud; but it was contended for the plaintiff that he was liable for the wrongful acts of Stewart & Lambe, who for the purpose of issuing the prospectus must be considered as his agents, and in support of this proposition we were referred to the judgment of the Exchequer Chamber in *Barwick* v. *English Joint Stock Bank* (1), where the Court, after citing many cases in which masters have been held liable for the tortious acts of their servants, say, "In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

(1) Law Rep. 2 Ex. at p. 266.

This is an authority binding upon us; and were it not so, we should entirely agree with it; nor do we consider it, for the purposes of this case, in any way affected by what was said in the House of Lords in the case of *Western Bank of Scotland* v. *Addie* (1); but it remains to be seen whether it applies to the circumstances of the present case, and for this purpose it becomes necessary to look closely into the principle to which effect was given by it. Wherever there is fraud, those who personally are guilty of it are responsible, whatever may be their number, or the relation which they may bear to each other or to any by whom they may be employed, and no doctrine is more clear than that by which it is established that one who is guilty of fraud cannot shelter himself under the authority of his principal. Beyond this, moreover, it has long been settled law that where an agent is guilty of a fraud in the conduct of his master's business, the master, the employer whose agent he is, is answerable for it. This rule was the ground of Lord Holt's decision in *Hern* v. *Nichols* (2), and it has been acted upon from that time in numerous cases, many of which were discussed and considered in *Udell* v. *Atherton* (3), but in all, without exception, they have been cases in which the person committing the fraud has been the agent carrying on the recognized business of the principal and for his benefit, so that the contract in respect of which the fraud was committed was the contract of the principal. In *Barwick* v. *English Joint Stock Bank* (4) the fraudulent act on which the plaintiff's right was founded, viz., the giving of a false guarantee, was that of the defendants' manager, and was done by him in the usual course of his duty to his principals, the defendants, and with respect to a matter that was clearly the business of and transacted for the benefit of the defendants.

In the present case a different state of facts occurs; and the question arises, can it be truly affirmed that the individuals, who happen to be directors, concurring in the resolution appointing the brokers, were each and every of them principals in such a sense as to make them, though innocent, liable for the fraudulent acts of the brokers. If they were not, the rule would apply

(1) Law Rep. 1 H. L., Sc. 145.
(2) 1 Salk. 289.
(3) 7 H. & N. 172; 30 L. J. (Ex.) 337.
(4) Law Rep. 2 Ex. 259.

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which is stated by Lord Kenyon in *Stone* v. *Cartwright* (1) in an action for negligently working a mine adjoining the plaintiff's land. He says: "The action must either be brought against the hand committing the injury, or against the owner for whom the act was done." The matter is one of the greatest importance, and there are considerations of policy which may be urged on both sides; but when entering upon it we would say that we think it essential to act upon some clear principle of law, and that we agree with what was said by Bramwell, B., when delivering his judgment in the Exchequer Chamber in *Swift* v. *Jewsbury* (2), where he says: "No doubt there are cases in which a man may be charged with having committed a fraud when he has not committed it himself, but I think that that ought to be held in as few cases as possible."

Who, then, were the principals of the brokers when they issued the prospectus, and for whose benefit was it issued? The answer is, that the company, and the company alone, were the principals. The company were the borrowers of the money for which the debentures were issued, and the company and the company alone received the money which was in fact paid in to their bankers. The directors were merely the officers and agents of the company, as was also the secretary, in carrying into effect the resolution of the company and of the whole body of the shareholders that the debentures should be issued. No doubt the instructions to the brokers to obtain money on debentures must be taken to imply an authority to do all acts necessary or usually done for this purpose, and inter alia, the preparing, printing, and issuing of a prospectus; but in the doing of, or causing to be done, these acts, the directors were in no sense principals. The work was not their work, nor was it done for their benefit. It was the work of and done for the benefit of the company and its shareholders, who, as before observed, by resolution in general meeting had authorized and directed that debentures should be issued. There is no suggestion that the defendants were guilty of even negligence in the course which they adopted, so as to give application to the maxim, "Crassa negligentia dolo æquiparatur;" but even were there any negligence upon their part, it would appear to us more sound in

(1) 6 T. R. at p. 412. (2) Law Rep. 9 Q. B. at p. 315.

principle to hold that the individual directors, in the absence of personal fraud, were not liable, but that the company was liable; and that for any default on the part of the directors, the company would, as was pointed out by Lord Westbury in the *Mersey Docks Co.* v. *Gibbs* (1) have a remedy over against the defaulting directors.

In arriving at this conclusion we have not overlooked the fact that cases may occur in which the conduct of directors of a company may be such that, although they may apparently act as directors, what they direct to be done must be taken to be so in furtherance of their own interests alone, and so distinct from the business of the company as to make them in truth principals in respect of these particular acts, and as such liable for the acts of those whom they employ. In such cases, no doubt, directors might be unable to shelter themselves by asserting that they were mere agents for the company, and therefore not responsible; but this would be so, because such an assertion would be untrue in fact, their conduct having been illusory, and whilst they professed to act as agents they were, in truth, principals. This cannot be said in the present case. No act of the defendants can be pointed to as inconsistent with their duty to the company or as ultra vires.

The appointment of Messrs. Stewart & Lambe was one of a class of acts essential to the welfare of the company, and to carry out the immediate objects which the shareholders had in view. The advancing of the money by the directors, and the repayment of it out of the money obtained by the debentures, in the absence of any knowledge upon their parts of the false statements contained in the prospectus, does not in our judgment affect the question. Thus far, therefore, it appears to us the defendants are not liable. This leads us to another part of the case, which was much pressed upon us by the counsel for the plaintiff, and which involves an argument somewhat similar in character to that which we have already dealt with.

It was said that the finding of the jury, that Barnett received benefit from the fraud of Stewart & Lambe, makes him personally liable. We cannot accede to this proposition. In Barnett's case

(1) Law Rep. 1 H. L. at p. 127.

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it would probably be sufficient to say that his liability was negatived by the finding of the jury that he received the benefit without knowledge of the fraud; but we think the answer rests upon a broader basis. In the absence of personal fraud, the fact that the directors received an ultimate benefit, by the repayment to them of their advances out of the proceeds of the debentures, does not, in our judgment, affect their position, any more than the payment to any other creditors of debts contracted by the company and bonâ fide due to such creditors. A man may, indeed, adopt a fraudulent act done for his benefit, and so become liable for it as if he had authorized it beforehand; but the arrangement by which the directors were to be repaid out of the moneys obtained by the issue of the debentures, and the actual repayment, though in some sense consequent upon, have no necessary connection with, the fraudulent statements contained in the prospectus. The directors were perfectly justified in stipulating how they should be repaid, and the money which they received cannot for this purpose be identified with the fraud.

The only authority cited on behalf of the plaintiff which has any bearing on this part of the case is the decision of the Privy Council in *Mackay* v. *Commercial Bank of New Brunswick*. (1) The facts were, that an officer of the defendants, a banking corporation, whose duty it was to obtain the acceptance of bills of exchange, fraudulently and without the knowledge of the directors made a representation to the plaintiff, omitting a material fact, whereby the plaintiff was induced to accept a bill of exchange in which the bank was interested. The Judicial Committee held the bank liable for the fraud of their officer, saying (at p. 410): "Their Lordships regard it as settled law that a principal is answerable where he has received a benefit from the fraud of his agent acting within the scope of his authority." In support of this proposition their Lordships cite Lord Holt's decision in *Hern* v. *Nichols* (2), and a series of cases ending with *Udell* v. *Atherton* (3) and *Barwick* v. *English Joint Stock Bank* (4), in all of which the fraud was committed by an agent in the course of his duty

(1) Law Rep. 5 P. C. 394.
(2) 1 Salk. 289.
(3) 7 H. & N. 172; 30 L. J. (Ex.) 337.
(4) Law Rep. 2 Ex. 259.

towards and for the benefit of a principal in the usual course of business. The judgment, therefore, in this case does not extend the well-known rule of law, to which we have already alluded. It deals with the receipt of a benefit by the principal, as one of the pieces of evidence to shew that the agent was acting for him, and that therefore he is bound by his acts as principal, but it in no way tends to shew that a person who is not a principal, but an intervening agent, such as a director, is to be treated as a principal, when he is acting for the interests of his company, or that he is liable for the fraudulent acts of those he employs, because he may directly or indirectly receive an ultimate pecuniary benefit which is not the immediate and direct result of the fraud. As to the defendant Barnett, therefore, we think he is entitled to have a verdict and judgment entered in his favour. Hitherto we have dealt with the findings of the jury with respect to the defendant Barnett.

As to Baldwin, the jury found that the prospectus contained false statements by which the plaintiff was led to part with his money, and that these were made by Stewart & Lambe within the scope of their authority; that they were not made personally or by the authority of Baldwin, but that he received benefit. Upon these findings the learned judge directed the verdict to be entered for the plaintiff, giving leave to Baldwin to move.

The findings are practically the same as those against Barnett, except that the jury do not say that Baldwin received benefit without any knowledge of the fraud. We take this to mean that, although Baldwin was not aware of the false statements contained in the prospectus before it was issued, he became aware of them before he was repaid the money which he had advanced for the working of the mine. Having reference to the manner in which we have already dealt with this, we need only say that this finding does not shew that he was the principal of the brokers, and does not affect his claim to be repaid his advances by the company. And we think, consequently, that upon the leave reserved, judgment ought to be entered for Baldwin.

As to Bell, the jury found that there was no personal fraud, but that Stewart and Lambe were his agents in respect of the statements in the prospectus, and that he received no benefit. This

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finding, that the brokers were his agents, we have already observed, is contrary to the evidence. Judgment must, therefore, be entered for him, pursuant to the leave reserved.

As to Dymes, the jury found that he had personal knowledge of three of the false statements contained in the prospectus, and that they were made by him fraudulently. If this finding be right, the verdict against him should stand. Upon careful consideration, however, of the evidence relating to these three findings, we have come to the conclusion that, upon the evidence, the verdict of the jury cannot be supported, and that as regards the defendant Dymes there ought to be a new trial.

Solicitor for plaintiff: *Fox.*
Solicitors for Barnett & Dymes: *Trinders & Curtis Hayward.*
Solicitors for Baldwin: *Bailey, Shaw, Smith, & Bailey.*
Solicitors for Bell: *G. S. & H. Brandon.*

Nov. 26.

RAWLENCE AND OTHERS *v.* THE GUARDIANS OF THE POOR OF THE HURSLEY UNION.

Poor Law—Union Assessment—Valuation—27 & 28 *Vict. c.* 39, *s.* 4.

The valuation required by s. 4 of the Union Assessment Committee Amendment Act, 1864, is not a field valuation, but one giving the collective value of the hereditaments of each occupier.

THIS was a special case stated in an action by the plaintiffs, land surveyors and valuers, for work done for the defendants as assessment committee of the Hursley Union.

In March, 1875, it became necessary under 37 & 38 Vict. c. 54, and other Acts in force relating to the relief of the poor, that a new assessment and valuation list should be made of the Hursley Union, and the defendants employed the plaintiffs to make the same at an agreed scale of remuneration.

The plaintiffs made a valuation list which was in eight columns, in the first of which was the number on the ordnance map, and in the second the name of the occupier. The next three columns contained the name of the owner, the description of property (whether arable, pasture, &c.), and the name or situation of the

property. The sixth column contained the estimated extent of each parcel referred to. The seventh and eighth columns were headed "Gross estimated rental" and "Rateable value" respectively. Where a person occupied more parcels than one the estimated extent of all the parcels in his occupation was added up, and the total inserted in the sixth column at the end of the enumeration of such parcels, and in that case the gross estimated rental and the rateable value were carried out in the last two columns opposite to and in respect of these totals, and not against every item in the list.

The question for the opinion of the Court was, whether the valuation list, as judged by a sample set out in the schedule to the case and described above, was a sufficient valuation under the provisions of 27 & 28 Vict. c. 39, s. 4 (1), or whether the defendants were entitled to have a separate valuation of each field in the several occupations.

A. Charles, Q.C. (*Bromley* with him), for the plaintiffs. Under the Act the valuation is required for the purpose of enabling occupiers to be assessed, and it is sufficient for that purpose.

Lumley Smith, for the defendants. The valuers have not shewn the particulars of the hereditaments comprised in the valuation. It is very desirable to have the values of the different fields set out to prevent the necessity for re-valuing in case of changes in the occupation.

KELLY, C.B. I think the valuation is made out in conformity with the Act, though it has, in my opinion, gone into unnecessary detail in setting out the particulars of the different fields. The object of the valuation is not to obtain the value of each separate hereditament numbered in the ordnance map, but to afford a convenient means by which the union assessment committee can

(1) The Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 4, is as follows:—"Where a valuer is appointed by the assessment committee he shall make his valuation in writing, shewing the particulars of the several hereditaments comprised therein, and the amounts at which he has valued the same respectively, and shall sign such valuation, which shall be open to inspection in like manner and with the same incidents with respect to the taking of copies or extracts as the minute books of the committee."

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assess each occupier. No doubt it is convenient for the valuers to go through each field as marked on the ordnance map, but for the purposes of the Act it is sufficient if they give the rateable value of the hereditaments of each occupier, which can be done without a field valuation. The plaintiffs are, therefore, entitled to judgment.

CLEASBY, B., concurred.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Gregory, Rowcliffes, & Co., for C. Watman, Salisbury.*

Solicitors for defendants: *Clarke, Rawlins, & Clarke.*

Dec. 6.

HADGETT *v.* THE COMMISSIONERS OF INLAND REVENUE.

Stamp Duty—Order of Charity Commissioners—Appointment of Trustees and Vesting of Property—The Stamp Act, 1870 (33 & 34 *Vict. c.* 97) *ss.* 8, 78.

An order of charity commissioners, by which new trustees of a charity are appointed and the property of the charity vested in them, is chargeable, under s. 8 of the Stamp Act, 1870, with duty in respect both of the appointment and of the vesting order, and does not come within the proviso to s. 78 as a conveyance or transfer made for effectuating the appointment of a new trustee.

CASE STATED by the Commissioners of Inland Revenue, pursuant to the 19th section of the Stamp Act, 1870, on appeal against an assessment, made by the commissioners, of the amount of the stamp duty chargeable on an order of the Board of Charity Commissioners for England and Wales for the discharge and appointment of trustees of a Wesleyan Methodist Chapel.

The order, after reciting that the usual preliminary steps had been taken, and that there was a doubt as to the validity of the appointment of the existing trustees, removed and discharged three persons from being trustees of the charity, and appointed the remainder of the former trustees and eleven other persons to be trustees. The order then continued:—"And the said board do hereby further order that the aforesaid chapel, with the appurtenances comprised in the said above-mentioned indentures of the 14th and 15th days of June, 1833, and all term and estate therein, and all other lands and hereditaments (if any) held in

trust for the benefit or purposes of the said charity and not being of copyhold tenure, with the appurtenances, do vest in the said persons who by virtue hereof are constituted the trustees of the said charity, their heirs, executors, administrators and assigns, according to the legal nature of the same premises, upon and for the subsisting trusts thereof." The Commissioners of Inland Revenue were of opinion that the instrument was chargeable under the provisions of "the Stamp Act, 1870," with the stamp duty of 10*s.* as an appointment of new trustees, and also with the further stamp duty of 10*s.* as a conveyance or transfer of property, and assessed the duty at the sum of 1*l.*

The question to be decided by the Court was with what amount of stamp duty the instrument was chargeable?

The stat. 33 & 34 Vict. c. 97, by s. 3 grants the duties specified in a schedule. By s. 8: "Except where express provision to the contrary is made by this or any other Act—an instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters." By s. 78, "every instrument, and every decree or order of any court or of any commissioners, whereby any property on any occasion, except a sale or mortgage, is transferred to or vested in any person, is chargeable with duty as a conveyance or transfer of property. Provided that a conveyance or transfer made for effectuating the appointment of a new trustee is not to be charged with any higher duty than 10*s.*"

The schedule contains the following "appointment of a new trustee and appointment in execution of a power of any property, or of any use, share, or interest in any property, by any instrument not being a will, 10*s.*, and see s. 78."

"Conveyance or transfer of any kind not hereinbefore described, 10*s.*, and see s. 78."

Herschell, Q.C. (*Sim* with him), for the appellant, contended that under the proviso to the 78th section the order was chargeable with a 10*s.* stamp only.

Sir Hardinge S. Giffard, S.G. (*Dicey* with him), contended that under the 8th section the order related both to the appointment of

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trustees and to the conveyance of property, and was chargeable with duty in respect of each of such matters.

KELLY, C.B. The language of the statute is very clear; and although there may be cases in which the mere appointment of trustees at once transfers the trust property, it is not so here. Under the Charitable Trusts Acts (1) empowering commissioners to deal with this subject whether by one or two instruments, they may appoint a trustee, and they may also, and in addition to the appointment of a trustee make a vesting order (whether the order is part of the same instrument or not is not material) vesting the property, and transferring it into the hands of the new trustee so appointed. The 8th section of the Stamp Act, 1870, says: "An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters." Under the schedule an appointment of a trustee is subject to a duty of 10*s.*; but an order of commissioners vesting any property whatsoever in another, is also subject to a duty of 10*s.* Here are two distinct things, appointment and vesting, each of which involves a stamp, and that is exactly applicable to the present case. The only part of the statute which seems to operate against this view is the 78th section, which provides: "That a conveyance or transfer made for effectuating the appointment of a new trustee" is not to be charged with any higher duty than 10*s.* So that so much of this instrument as relates to the effectuating the appointment of a new trustee is not to be charged with more than 10*s.* Then there is also a conveyance or order vesting the property in the trustees; that is another matter altogether. It is clearly additional to and irrespective of, though connected, with the earlier provision in the order, namely, the appointment of the new trustee.

CLEASBY and POLLOCK, BB., concurred.

Judgment for the Crown.

Solicitors for appellant: *Gregory, Rowcliffes, & Co.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

(1) See 23 & 24 Vict. c. 136, s. 2.

[IN THE COURT OF APPEAL.]

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Nov. 28.

ANGELL *v.* BADDELEY.

Sheriff—Side-bar Rule to return Writ of fi. fa.—Interpleader.

On a levy by a sheriff under a writ of fi. fa. three persons claimed different portions of the goods. The sheriff interpleaded, and three separate orders were made directing that, on payment of certain distinct sums into court by the claimants within seven days, the sheriff should withdraw and issues should be tried; in default of payment he should sell and pay the proceeds into court. One of the claimants paid money into court, and the interpleader issue in his case was set down for trial. The other two abandoned their claims, but the sheriff withdrew from possession:—

Held, affirming the decision of the Exchequer Division, that the execution creditor, pending an interpleader issue, had no right to the immediate return of the writ.

THE plaintiff on the 31st of August, 1877, obtained judgment against the defendant for 38*l.*, and thereupon issued a writ of fieri facias directed to the sheriff of Middlesex to levy an execution on the defendant's furniture at her house, 23, Charlotte Street. The sheriff levied upon the goods, to which three persons respectively laid claim. One Ramus claimed certain of the goods under a bill of sale; one Edward Baddeley, a relative of the defendant, claimed certain of the goods on the top floor of the house as his own property; and one E. A. Hunt claimed the residue of the goods in the drawing-room floor of the house also as his own property. The sheriff thereupon issued an interpleader summons, and at the hearing the learned judge having been informed that the value of the goods seized amounted to 105*l.* made three interpleader orders, and directed that in Ramus' case upon payment of 45*l.* into court, within seven days of the date of the order, the sheriff should withdraw from possession of the goods, but unless the money was paid into court within that time that the sheriff should proceed to sell the goods, and he directed that an interpleader issue should be tried between the claimant Ramus and the plaintiff. Similar orders were made in the two other cases upon the claimants, Baddeley and Hunt respectively paying into court the sums of 40*l.* and 20*l.* Ramus paid 45*l.* into court, and an interpleader

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issue was settled and set down for trial. Baddeley and Hunt did not make the payments ordered, and eventually they abandoned their claims; and with respect to the goods claimed as belonging to them the sheriff, instead of selling as directed by the orders, withdrew from possession. The plaintiff then obtained the usual side-bar rule calling upon the sheriff to return the writ of fieri facias. A judge at chambers, on a summons taken out by the sheriff, set aside the rule. The Exchequer Division affirmed the judge's decision.

The plaintiff appealed.

Lyon, for the plaintiff. The side-bar rule was set aside upon the ground that pending an interpleader issue the sheriff cannot be compelled to return the writ of fi. fa. There is no authority for this proposition. But assuming it to be law, it cannot apply where there has been only a partial compliance with the interpleader orders. It is true that in Ramus' case an interpleader issue is pending, but the two other claimants have failed to comply with the orders, and as against them the execution creditor is entitled to have the goods sold, and the money paid to him. The sheriff has withdrawn from possession, and the execution creditor is entitled to a return of the writ in order, if so advised, that he may proceed against the sheriff. He is not bound to wait until the interpleader issue between Ramus and himself is tried, for before that occurs the sheriff might be out of office and the remedy against him barred by lapse of time, or the sheriff might die, in either of which cases the execution creditor would be unable to obtain redress. But the execution creditor is entitled as a right to rule the sheriff to return the writ. This is distinctly laid down in Watson on Sheriff, p. 81. "The party whose writ it is may rule the sheriff to return it at any time." The sheriff, as a general rule, is bound to return the writ on request, and he can be compelled by a side-bar rule; no action will lie against the sheriff who has not been ruled: *Morland* v. *Leigh*. (1) The same law is laid down in Lush's Practice, p. 736. The first proceeding in order to fix the sheriff is to compel a return of the writ, which is done both in vacation and in term by a side-bar rule.

(1) 1 Stark, 388.

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In Chitty's Forms, p. 327, a precedent of a return of fieri feci as to part, with an interpleader order as to the residue, is given. There is no reason why a return somewhat similar could not be made by the sheriff if he had obeyed the order which was made at his own instance.

Cock, for the sheriff. Until the interpleader issue is decided the sheriff ought not to be called upon to make any return to the writ, for if the execution creditor succeeds in the issue he will have his debt satisfied out of the money that is paid into court. The sheriff is not bound to seize any particular goods, he may make the debt out of any goods of the debtor he pleases. He has a right to say also certain goods are the debtor's goods and others are not; provided that there are sufficient goods to satisfy the execution creditor's debt he has no cause of complaint—enough money has been paid into court to satisfy his debt. If the creditor should be unable to establish his claim under the interpleader issue, then the sheriff would be liable if he has made any default, but in the present stage of the proceedings it is premature to rule the sheriff to return the writ; it might be a useless proceeding. Indeed he cannot make any return at present—the sheriff cannot return fieri feci, he cannot return nulla bona, nor can he make any valid return to the writ—any return that he now makes would be bad. At the proper time the sheriff will be prepared to make a return. The practice is not to require the sheriff to return the writ pending an interpleader issue.

Lyon, in reply. If the sheriff is unable to make a good return to the writ the difficulty is entirely of his own creating. If he had obeyed the orders, and on the two other claimants making default in the payment of money into court, he had sold the goods, there would have been no difficulty. He first seeks the protection of the Court under an interpleader order, and then he disobeys it, he must therefore take the consequences. If the sheriff has any valid excuse for not executing a writ, he may state such matter of excuse in his return as that the defendant is privileged: Watson on Sheriff, p. 95. It is the sheriff's own fault if he cannot make a good return to the writ, and he ought not to be allowed to take advantage of his own wrong, and be excused from returning the writ.

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BRAMWELL, L.J. I am of opinion that the appeal should be dismissed. If the execution creditor was entitled, as a matter of right, to a side-bar rule calling on the sheriff to return the writ, then I think the best course would have been for the judge to have enlarged the time for making the return until after the interpleader issue had been tried. It seems to me, however, that the execution creditor was not entitled as a matter of right to the rule, and the judge at chambers had a discretion to set the rule aside if it had been improperly issued. The facts are that certain goods are seized as the goods of the debtor, whereupon three claimants allege a title to different portions of the goods, and three different interpleader orders are made, in the usual form to the effect that, if the claimant within a certain time pays into court a certain sum, the sheriff do withdraw from possession; but if default be made in the payment of the money that the sheriff sell the goods, and that an interpleader issue be tried between the claimant and the execution creditor as to the title to the goods. Now, I think the sheriff misinterpreted the order; he seemed to consider that if enough was paid into court under one order to satisfy the plaintiff's debt, he was at liberty to withdraw from possession as to the goods claimed by the other persons. He, however, has withdrawn from possession in all the cases. Now, if the claimant who has paid money into court is entitled to succeed in his interpleader issue, the execution creditor has a right to demand from the sheriff the proceeds of the goods which he had been ordered to sell: and if default was made by the other claimants in the payment of the money into court, and if the sheriff can give no satisfactory answer to the plaintiff, he might then be required to return the writ, and if he returned nulla bona he would be liable for not having kept the goods, or if he returned fieri feci then he would be bound to pay the money to the plaintiff. Therefore, in the event of Ramus succeeding, the plaintiff will have a good remedy against the sheriff; if Ramus fails, the money he has paid into court is sufficient to satisfy the plaintiff's claim: therefore, whether Ramus succeeds or not the plaintiff has a remedy. But, it is said if Ramus succeeds against the plaintiff, instead of having the money in court under the other interpleader orders, and a certain immediate remedy, the plaintiff will have merely a right of action

against the sheriff which is not so advantageous to him. To that objection it may be answered that if the plaintiff was likely to be prejudiced by the act of the sheriff, he should go to the Court or a judge and claim the benefit of the interpleader orders, and call upon the sheriff to sell the goods.

It seems to me, therefore, that the plaintiff is adequately protected, and that the side-bar rule ought not to have been obtained. I think that this appeal ought to be dismissed, and that the judge at chambers and the Exchequer Division were right.

BRETT, L.J. I am not prepared to say that the sheriff acted rightly in withdrawing from possession, or that he had any discretion in the matter. The sheriff had a discretion before he obtained the interpleader order, but after he had applied for an order in respect of each claimant, and had obtained a protection in certain terms, he was bound to obey the order. I am inclined to think that the sheriff might be attached for not obeying the order made at his own instance, but it is not necessary to decide that point. The only ground on which I can concur is that Mr. Lyon has not made out that pending the interpleader order the plaintiff had a right to an immediate return to the writ of fieri facias, and on this ground I think that the judge at chambers had a discretion whether he would set aside the side-bar rule or not. The test whether the right is absolute or not is to see whether the return would be of any use to the plaintiff. I cannot see that any return the sheriff can make to the writ pending the interpleader issue can be of any use to the plaintiff; the return would be futile, therefore the judge had a discretion, and this appeal should be dismissed.

COTTON, L.J. There must be, pending an interpleader issue, a discretion in the judge whether the sheriff shall be bound to make a return to the writ; and in the absence of any absolute and immediate right to call for a return, the judge may or may not order the side-bar rule to be set aside. The plaintiff can ask for a return to the writ at the proper time. I cannot see how the plaintiff can be benefited by a present return. He cannot bring his action until after the interpleader issue is decided. I

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am not inclined to say that the sheriff has any right to withdraw from possession and give up the goods; but it is not necessary to decide that point. I think the decision of the Exchequer Division was right, and this appeal should be dismissed.

Appeal dismissed.

Solicitor for plaintiff: *Angell.*
Solicitor for sheriff: *Maynard.*

Nov. 28.

THE BENFIELDSIDE LOCAL BOARD *v.* THE CONSETT IRON COMPANY, LIMITED.

Mine—Right to Support of Surface—Inclosure Act—Reservation to Lord of Manor.

6 App Cas 463

Commissioners, acting under the powers conferred on them by a local inclosure Act for inclosing certain commons, set out public highways over the land, and directed that they should be maintained by the inhabitants and occupiers of the township in which they were situated, and that it should be lawful for all persons to use the same. The Act reserved to the lord of the manor, his successors and assigns, in the widest terms, all rights belonging to the manor, and all mines, minerals, and quarries under the commons, with power to do every act necessary for the draining, winning, and working such mines, minerals, and quarries as fully and freely as he or they could have had, held, used, or enjoyed the same in case the Act had not been made, without paying any damages or making any satisfaction for so doing. The assignees of the lord of the manor worked the mines so as to injure one of the roads set out by the commissioners. In an action against them by the local board, on whom the duty of repairing the road fell, to recover the expense of doing so:—

Held, that the reservation to the lord of the manor must be taken to be subject to the public right created by the statute, and did not protect the defendants from liability.

CASE stated in an action brought by the Benfieldside Local Board to recover damages for injuries done to certain highways within their district by the defendants. The following are the material parts of the case, the paragraphs being numbered as in the original.

1. In the year 1773 an inclosure Act, known as the Lanchester Common Division Act, was passed for the purpose of dividing and inclosing certain moors, commons, or tracts of waste land within the parish and manor of Lanchester, in the county palatine of Durham, containing by estimation 20,000 acres or thereabouts.

2. The preamble recited that the Bishop of Durham, in right of his church and see of Durham, was lord of the manor of Lanchester aforesaid, and as such seized of and entitled to the soil of and royalties within and under the moors, or commons, or tracts of waste lands; and certain commissioners were appointed for the purpose of making the division.

3. The Act enacted that the commissioners should "assign, set out, and appoint such public highways and roads in, through, and over the residue or more improveable parts of the said moors or commons intended to be divided and inclosed, as they shall think proper and convenient (which highways and roads shall not be less than sixty feet of assize in breadth between the ditches), and shall also assign, set out, and appoint proper parts of such residue or more improveable parts of the said moors or commons for common quarries, common watering places for cattle, and common wells, and shall also assign and set out such common public and private horse and other roads, ways, passages, and bridges, and such gates, styles, hedges, sewers, drains, and watercourses in, over, upon, and through the said lands and grounds, so to be inclosed, as they shall see proper, useful, and convenient."

4. It further enacted that the commissioners might order all public highways, roads, bridges, and drains by this Act appointed to be set out to be well and sufficiently made, &c., and might order how the expenses of making and keeping them in repair should be borne, and it continued, "after the making of the same award, and of such highways and roads and other ways, it shall not be lawful for any person or persons to make or use any roads or ways, either public, common, or private, in, over, or through the said allotments, or any of them, or any part thereof (other than and except the said lord bishop and his successors, and his and their lessees and assignees as hereinafter is mentioned), either on foot or on horseback, or with horses, cattle, carts, or carriages, or otherwise, other than such as shall be so set out and appointed by the said commissioners as aforesaid, and that all former roads and ways which shall be set out and appointed as roads and ways through the said intended inclosures shall be deemed part of the lands to be inclosed, and shall be divided and allotted, held and enjoyed, as part of such lands accordingly."

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5. It further enacted "that nothing in this Act contained shall be construed or adjudged to defeat, lessen, or prejudice the right, title, or interest of the said Lord Bishop of Durham as lord of the said manor of Lanchester, or his successors, or his or their lessees or assigns, or any of them, of, in, and to the seigniory and royalties incident and belonging to the said manor, but the lord of the said manor for the time being, and his lessee and lessees and assigns, shall and may from time to time, and at all times for ever hereafter, hold and enjoy all courts, perquisites, and profits of courts, rents, services, waifs, estrays, and all royalties, jurisdictions, matters, and things whatsoever to the said manor or to the lord thereof for the time being incident, belonging, or appertaining, other than and except such common right as could or might be claimed by him or them as owner or owners of the soil and inheritance of the said moors or commons, in as full, ample, and beneficial a manner to all intents or purposes as he or they could or might have held or enjoyed the same if this Act had not been made; and also that the said Lord Bishop of Durham, and his successors, and his and their lessee and lessees and assigns, shall and may from time to time, and at all times hereafter, have, hold, work, and enjoy all mines, minerals, and quarries of what nature or kind soever lying and being within or under the said moors or commons intended to be divided and allotted as aforesaid, together with all convenient and necessary ways and wayleaves in, through, over, and along the said moors or commons, or any part thereof, not only before, but also at all times after the same shall be divided in pursuance and by virtue of this Act, and full and free liberty at all times hereafter of making, laying, repairing, and using any new road or roads, waggon way or waggon ways, or any other way or ways whatsoever in, through, over, and along the same or any part thereof, and for that purpose to take away and remove any hedges, fences, trees, partitions, or other obstructions which shall be made for dividing the said moors or commons or otherwise, or which shall be standing or growing thereon, and to do every other act which shall be necessary to be done for the purpose aforesaid, and of searching for, draining, winning, and working the said mines and quarries, and also of all other mines and quarries belonging to the see and bishopric of Durham,

wheresoever the same are or be, by any ways or means now in use or hereafter to be invented, and also of leading and carrying away all and every the coals, lead, minerals, stones, the manure bred at the said mines, and other things to be gotten thereout, or out of any other lands or grounds whatsoever, and also of leading and carrying all iron, wood, materials, and things unto the said mines and quarries needful, necessary, or proper for the draining, winning, working, and use of the same respectively, and of making pit shafts, pit rooms, heap rooms, drifts, levels, watercourses, and drains, and of using as heretofore all those buildings, workshops for smiths and wrights, hay-yards and raff-yards, already erected for the purpose of working the coal mines under the said moors or commons, and of erecting and using fire engines and other engines, and other buildings, workshops, hay-yards and raff-yards, pit rooms and heap rooms, and all and every other necessary and convenient works, buildings, erections, liberties, powers, and authorities either now in use or hereafter to be invented; together, also, with full and free liberty, power, and authority from time to time, and at all times, at his and their will and pleasure, to remove and take away from off the said moors or commons, convert to their own use or uses all and every the rails, sleepers, iron, timber, and other materials of the said waggon ways and other ways, pits, shafts, fire engines and other engines, shops and other works, buildings, and erections whatsoever already laid, placed, built, or erected, or hereafter to be laid, placed, built, or erected as aforesaid, as fully and freely as he or they might or could have had, held, used, and enjoyed the same in case this Act had not been made, and that without paying any damages or making any satisfaction for so doing.

"Provided always and be it further enacted that in the leading or carrying away any of the coals, stone, rubbish, or other things to be gotten out of any coal pit or pits wrought or used for land-sale only, and which shall and may be led or carried away by any carts or wains or other carriages than coal waggons, and in the leading or carrying away any materials, utensils, or things to or from such pit or pits, the nearest and most direct roads, ways, or courses in or through the allotments to be set out as aforesaid, shall be used to and from such pit or pits into and from the next

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adjoining public or common highways, and no such roads, ways, or courses shall exceed sixty feet in breadth, and as little damage and spoil of ground as may be shall be done or made in or to such allotments by the winning or working of such land-sale pit or pits or passing or repassing of such carts, wains, or carriages."

6. In order to provide compensation for surface damage to the allotments by the working of the mines, minerals, and quarries, the commissioners were empowered to allot to the justices of Durham any quantity of the moor not exceeding 500 acres, and not less than 300 acres in one entire plot or parcel, to be held and enjoyed by them upon the several trusts, and for the intents and purposes thereinafter mentioned; and in reference thereto the Act contains a provision that when any person shall suffer any loss or damage in his allotment by the using any of the powers or liberties thereby reserved to the lord bishop and his successors, and his lessee and lessees and assigns as aforesaid, such person so damnified upon making such complaints shall receive such satisfaction for such damage as thereinafter is directed in that behalf.

7. After charging the rents to be derived from this last-mentioned allotment or parcel, with the expenses of management, it is enacted that the residue shall be disposed of as follows: Upon complaint of any person damnified the justices of the peace at their said sessions shall examine and inquire into such complaint in a summary way, and finally settle and determine the damages sustained by the person so complaining, and order their steward upon demand to pay the same, together with reasonable charges on account of making and prosecuting such complaint unto the person so complaining, and the residue (if any) shall be laid out in the repairing, amending, and supporting the public and common highways, causeways, and other ways set out by virtue of this Act in such manner as the justices shall direct. "And whereas it may happen in some years that the clear rents and profits of the said last-mentioned allotment or parcel of ground may not be sufficient to satisfy and pay all the damages and charges which may be so sustained, and so settled, ascertained, and determined by the said justices as aforesaid, Be it therefore enacted that in every such case so happening the deficiency after such application of the said rents and profits as aforesaid shall be

paid and borne by the owners or occupiers of all the several allotments of the said moors or commons (save and except the said allotments so to be vested in the justices but including that or those of the persons so damnified and making complaint) according to the respective yearly rents or values of the same as they shall respectively be rated or charged for or towards the relief of the poor of the several parishes, townships, or places wherein they shall respectively lie in such shares and manner as the justices shall direct."

Then followed a power to order a distress, and a provision that an occupier who had paid damages might deduct them from his rent.

8. In 1779, before the commissioners made their award, a further Act was passed, by which the commissioners were authorized to allot the plot free of all rents, tithes, and only subject to the payment of the yearly rent of 30*l*. It was further enacted that such yearly rent should be paid, applied, and disposed of under the direction of the justices in the same manner and form, upon the like complaints, inquiries and proofs, and for the same uses, ends and purposes, as the rents and profits of the plot in case the same had been let by the justices according to the first-mentioned Act.

9. The commissioners by their award, in pursuance of these provisions, allotted the allotment of 300 acres, subject to the perpetual rent-charge of 30*l*., which sum has ever since been paid to the treasurer of the county by the owners for the time being of the allotment; but it is quite insufficient to meet all the claims for compensation upon it.

10. The commissioners by their general award, made in accordance with the foregoing provisions, set out among other roads a public highway sixty feet in breadth in, through, and over the more improveable parts of the moors and commons, called the Shotley Bridge and Durham Road, and also another public highway sixty feet in breadth in, through, and over part of the moors and commons, called the Shotley Bridge and Newcastle Road, and thereby directed that the same should be (as to the portions within the township of Benfieldside) for ever thereafter maintained and kept in repair by all and every the inhabitants and occupiers

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for the time being of lands, tenements, woods, tithes, and hereditaments within the township of Benfieldside, in like manner as the inhabitants and occupiers were by law liable to repair other highways within the township.

11. The commissioners by their general award further ordered and directed that all and every the before mentioned public highways by them set out and appointed, as well those of the breadth of sixty feet as also the public roads or ways which are less than sixty feet in breadth, should at all times thereafter be and continue of the several and respective breadths hereinbefore mentioned and prescribed. And that it should and might be lawful to and for all persons whomsoever at all times thereafter to go, pass and re-pass on foot and on horseback, and with horses, coaches, carts, and carriages. And also to lead and drive all and all manner of cattle and other things in, through, over, and along the said respective public highways and roads at their free will and pleasure.

12. Under a large portion of the 20,000 acres so allotted, including the part of the land so allotted near to and under the highways, there were and are valuable seams of coal, which, as before stated, were at the time of the passing of the Act of 1773 the property of the bishops of Durham, and were specially reserved to them under the clauses of the Act above set out. These coal seams now belong to the Ecclesiastical Commissioners, who are now lords of the manor, with the same powers of working and leasing the coal seams and minerals as the bishops of Durham previously enjoyed. The coal seams have been leased by them to and are worked by the Consett Iron Company, the present defendants.

13. In consequence of the mining operations of the defendants, which have been carried on near to and underneath the two highways so set out as above-mentioned, portions of these roads near to Blackfine and Shotley Bridge Railway station, and within the township of Benfieldside, sank below their original level and became, until repaired, dangerous to travel over.

14. The Benfieldside Local Board, in whom the roads within the township of Benfieldside are now vested, and whose duty it is to repair them, have been put to an expense of about 30*l.* up to the present time in filling in the cracks and falls caused by the

shrinking of the surface of those roads in consequence of such mining operations, and in keeping such roads level and in good repair.

15. The defendants admit the damage done to the roads, but they refuse to reimburse the local board the expenses they have so incurred, on the ground that under the mining powers and reservations contained in the Lanchester Inclosure Act of 1773, they are entitled to work the whole of the coal without being under any obligation to leave any support for the surface, and without making any compensation for injury thereto.

16. At the time of the passing of the Lanchester Inclosure Act of 1773 the customary mode of working coal in the county of Durham was by leaving ribs or pillars of coal to support the surface, and such continued to be the practice till shortly after the passing of the Act, since which time it has become customary to take the whole of the coal where the owner of the coal is not liable for surface damage in working such coal, it being usual to begin by leaving pillars of coal to support the roof, which pillars in working back again are removed. Some of the seams of coal under and near to the roads in question are on the outcrop, and so near the surface that the coal could not be worked, even by leaving pillars of coal, without probably causing some, although slight, damage to the roads.

17. It is admitted that the coal has been and is worked by the defendants in the usual manner, according to the present mode of working coal, when the object is to extract the whole of the coal without regard to the damage done to the surface, but that the effect of such working has been and is to damage the highways, and to cause them to be out of repair, and if such mode of working is pursued under the roads, that many parts thereof will become, where they are near the outcrop, quite impassable.

18. The owners and lessees of the coal contend that the Act grants to them right at all times, after the passing of the Act, to hold, work, and enjoy all mines, minerals, and quarries lying under the moors and commons, and full and free liberty at all times thereafter of making any new road or roads or waggon way, over and along the same, with power to remove the fences made for dividing the moors, and to do every act necessary for

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searching for and winning and working the mines by any ways or means then in use, or thereafter to be invented, and that without paying any damages or making any satisfaction for so doing. They also rely on the fact that the award made in pursuance of the Act points out fully the mode in which all roads set out under the Act shall be maintained. And, moreover, that the Act itself provides a special fund, out of which any damages to be caused by working the mines shall be paid, and in the event of that source proving insufficient, it enacts that the deficiency shall be made good by the proprietors of all the allotments.

They also contend that if the improved method of mining, under which the whole of the coal came to be removed, was not put in practice until after the date of the Act, yet such altered mode of working is nothing more than is permitted by the Act, in giving power to work the mines without limitation of any kind, and in describing the powers and authorities conferred as being those either then in use or thereafter to be invented.

19. The Benfieldside Local Board, on the other hand, contend that the roads referred to being set out under the authority of the Act as public highways, every other clause in the Act must be construed as subject to the paramount right of the public to have the highways supported by all or so much of the coal as is necessary for their support and kept free from pitfalls; also that from the mode of working coal at the time the Act was passed, it was not contemplated that any serious injury would follow from the working of the coal such as now results from the entire removal of the coal, and that the compensation clauses have consequently relation to surface injuries by acts done on the surface, but that in any view of the case the compensation clauses do not affect the present question, as those clauses were only intended to cover damage done to the allottees in their allotments under the powers reserved to the owners of the minerals and their lessees.

20. On these facts the question for the opinion of the Court is —On the proper construction of the Lanchester Inclosure Act, are the owners of the minerals, and their lessees, entitled to work the coal, and so as to withdraw the natural support of the roads set out under the Act, and that without making any compensation for injury thereby caused to such roads?

If the Court should be of opinion that they are not so entitled, the judgment in this action shall be entered for the plaintiffs for 30*l.* damages and costs, otherwise judgment shall be entered for the defendants with costs.

Cowie (*J. D. Fitzgerald* with him), for the plaintiffs. This is not the case of an interference with a private right as in *Blackett* v. *Bradley* (1), but the question is what is to be the effect of the Act when a public and a private right, both created by it, are in conflict. [He also cited *Roberts* v. *Haines* (2), *Duke of Buccleuch* v. *Wakefield* (3), and *Hext* v. *Gill.* (4)]

Herschell, Q.C. (*Crompton* with him), for the defendants. The Act not only says that the lord of the manor is not to be liable for damage done, but it points out how such damage is to be compensated. It is admitted that such a claim as the present must be founded on express words in the Act, but there is no ambiguity whatever in this case. [He cited *Buchanan* v. *Andrew* (5) and *Aspden* v. *Seddon.* (6)]

KELLY, C.B. I think the plaintiffs entitled to the judgment of the Court. The question arises under an Inclosure Act of 1773 for inclosing Lanchester Common. Under the provisions of that Act certain public roads have been constructed, and when we look to the case we find in paragraph 3 the power under which this is done, and we find by paragraph 4 that these roads are in lieu of the former, which are extinguished as highways and after the making of the new ones can no longer be used. As regards the public, the commoners, and all persons interested, it was the duty of the commissioners to set out these public roads, and that having been done, it appears that mines have been since worked in such a way as to damage these roads, and indeed to threaten their total destruction. The question is whether the act of the owner of the mines, in working them so as to damage the highways, is lawful. It is contended that under the express words of the Act of Parliament the owner is entitled to work the mines without leaving any support; and that so the roads may become

(1) 1 B. & S. 940; 31 L. J. (Q.B.) 65.
(2) 6 E. & B. 643; 25 L. J. (Q.B.) 353.
(3) Law Rep. 4 H. L. 377.
(4) Law Rep. 7 Ch. 699.
(5) Law Rep. 2 H. L., Sc. 286.
(6) Law Rep. 10 Ch. 394.

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dangerous without his incurring any liability. That is the claim, and it is necessary to inquire on what it is founded. The provisions of the Act set out in paragraph 5 preserve to the lord of the manor the right, not only to enjoy all mines, minerals, and quarries, with the necessary access to them, but to do every act necessary for the purpose of winning the minerals: he may search for them, carry them away, and is to have the use of the buildings necessary for that purpose, and the pit-rooms and heap-rooms, and in short everything that is requisite, "as fully as he might have had, held, used, and enjoyed the same in case this Act had not been made, and that without paying any damages or making any satisfaction for so doing."

If we take the whole of this clause, it is plain that if the owner of the mines has a right so to work them as to take away the support, he must be equally entitled (for either right would arise under this same clause) to erect a workshop on the highway and thus prevent its user. The plain answer to the defendant's contention is, that whatever power was reserved of working these mines without making satisfaction, that power must be read with the other express provisions of the Act; and if the Act provides by one clause a highway for all the Queen's subjects, it cannot be read as intending by another clause to sanction the destruction of that highway. Reading the different provisions of the Act together, the effect of that which requires the commissioners to set out highways is to put an end to any power which would otherwise be conferred by the statute, but which is inconsistent with the creation and preservation of these highways. Any act, therefore, the effect of which is to interfere with the preservation of the highways for their lawful use is not within the reservation, and unlawful. The authorities which have been cited for the defendants, if we give to them, as we are bound to do, their full effect, are not applicable to the state of things existing in this case.

CLEASBY, B. It is unnecessary to say anything on the many points raised on the cases cited, as in this case the question is different from any before considered. We have here an enactment that the commissioners are to set out roads, and it appears that in accordance with the provisions of the Act they did so. As soon

as this was done it is clear the public had a right to use the road, and to pass over it without hindrance or danger. This is a general right in respect of all highways which is most carefully preserved by the legislature. How can it be said that an Act of Parliament which appoints a public road has at the same time legalised a public nuisance by the stopping up of that very road? The same question might arise in other ways on this Act, as, for instance, in respect of the common wells which the commissioners are to set out. It certainly would be strange to find that any person could take away from the public the supply of water which it was intended to give by the statute. I should say it would be impossible to put any construction on this Act which would lead to such a result, because every private reservation must be read as subject to the public provisions, as if it had been expressed in so many words that that should be so.

I may say that I am not satisfied that the words in the 5th paragraph, "all mines, minerals, and quarries of what nature or kind soever lying and being within or under the said moors or commons intended to be divided and allotted," would not exclude the mines under the roads. But however that may be, I think it clear on the other part of the case that the defendants had no right to interfere with the user of the highway, and our judgment must be for the plaintiffs.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *Rogerson & Ford.*
Solicitors for defendants: *Torr & Co.*

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Dec. 6.

Revenue—Income Tax (Sched. A.) and Inhabited House Duty—Occupation—Police Superintendent residing at Police Station—16 & 17 Vict. c. 34 (Income Tax)—14 & 15 Vict. c. 36 (Inhabited House Duty.)

9QBD23 14.27 10QBD270 272 11QBD148

The appellant, a superintendent of police, lived with his family in a house within the boundary of a police station which included other buildings used for the purposes of the police district. There was a yard to the house, and a wall which divided the appellant's premises from the remainder of the police station, to which a door in the wall afforded access. The front entrance of the house faced the street. The appellant kept the keys of the house, which he had himself furnished, and for the use of which a deduction was made from his salary. He was compelled to live in the house, as that was necessary for the discharge of his official duties; the house was liable to be used for such purposes connected with the police force as the chief constable might direct; and the appellant was liable to be removed from station to station at any time:—

Held, that the appellant had not such an occupation of the house as to render him liable to pay income tax or inhabited house duty in respect of it.

CASE stated on appeal against an assessment under Schedule A of the income tax (1) and for inhabited house duty (2) on a house assessed at 50*l.* in each case, and occupied by the appellant, second superintendent of the police station at Stretford.

1. The county constabulary of Lancashire was established under 2 & 3 Vict. c. 93.

2. The county is divided into police districts or divisions, and station houses and strong rooms have been built and provided under 3 & 4 Vict. c. 88.

3. The force is annually inspected by a government officer, and if his report is satisfactory a grant is made by the Treasury in aid of the police rates, amounting to one-half of the expense of the pay and clothing of the force.

4. The house in which the appellant resides is included within the boundary of certain premises known as the Old Trafford police station, which comprises other buildings and offices provided for the purposes of the Manchester police district.

5. In addition to a communication between the appellant's house and the drill yard, there is a further communication between

(1) 16 & 17 Vict. c. 34, and 5 & 6 Vict. c. 35, s. 63, No. 9, rule 1.
(2) 14 & 15 Vict. c. 36, schedule.

the drill yard and the cell yard which adjoins and into which the cells open. (1)

6. It is necessary for the police purposes of the district of Manchester that the appellant should reside in the house in question for the due performance of his official duties.

7. The appellant is compelled to live on the premises in question, and the house in which he resides is liable to be used for such purposes connected with the police force as the chief constable of the county may direct, and the appellant is further liable to be removed from station to station at any time.

8. There is no accommodation in the appellant's residence beyond what is actually necessary for the requirements of himself and his family and the transaction of his business as superintendent of police, and he would not be permitted to make use of the premises for any other purpose.

9. The appellant is not assessed to the poor rate.

10. The appellant admitted that the house which he occupied was separate from the police station, but added that there was a communication with the station yard by a doorway in his own yard wall. The front entrance was quite distinct. He said that he himself possessed the keys of the house, and that he and his family alone had access thereto; that it was wholly occupied by himself and family, and furnished throughout with his own furniture; that it might occasionally be used as a place of detention for prisoners; and that on one occasion he had admitted a female prisoner there for a few hours who was not in very good health, and who was of a more respectable class than prisoners ordinarily are.

11. He contended that he was not liable to house duty, nor to Schedule A of the income tax, beyond the amount of his rental, 10*l.* 8*s.* per annum, and the reasons assigned were that the house was a part of the police station, it being included within the boundary wall known as the Old Trafford police station, that the force was annually inspected by a government officer, and

(1) It appeared from a plan attached to the case that a boundary wall ran round the whole of the premises known as the Old Trafford police station. The appellant's house, yard, and garden were at one end of these premises; at the other were the offices of the police station, the cells and cell yard, and in the middle was a drill yard. The appellant's premises were separated from the drill yard by a wall of partition in which there was a door.

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that the whole of the premises were used for the purposes of the county constabulary, and, being so used, were used for government purposes, and were exempt from assessment as being occupied for the purposes of the Crown, and that in any case the house in question ought not to be separately assessed, but should be included in one charge with the police station, some of the apartments of which were occupied by police constables, who paid rentals for them.

In support of his opinion he cited *Reg.* v. *St. Martin's, Leicester.* (1)

12. The appellant admitted that he was the officer of the county, and was paid out of the county fund.

13. The surveyor submitted that the case referred to did not apply, and that as the house in question was admittedly separate and distinct from the police station, its front entrance facing the street or road (formerly an ancient footpath), and the only communication with the station yard being by a doorway in the wall of its yard, which doorway could easily be closed up, and its being moreover furnished throughout by the appellant as a private residence, it was to all intents and purposes a private house, and was separately assessable upon its full annual value, for which the appellant was liable, he being the beneficial occupier.

After considering the statements of the appellant and the surveyor, the commissioners were of opinion that the appellant was the servant of the county and not of the Crown, and that the house being separate and distinct from the police station (the only communication being by a door in the yard wall to the drill ground), and being furnished by the superintendent at his own expense, was liable to be assessed upon its full annual value, and from its position was separately chargeable, and they confirmed the assessment.

Gorst, Q.C. (*Hulton*, with him), for the appellant, contended that the appellant did not occupy the house, within the meaning of the Income Tax Acts or the Inhabited House Duty Acts, so as to be liable to the assessments made on him. He referred to *Clark* v. *Bury St. Edmunds.* (2)

(1) 2 Q. B. D. 493. (2) 1 C. B. (N.S.) 23; 26 L. J. (C.P.) 12.

A. Dicey, for the respondent. The case expressly states that the appellant occupies this house. He certainly uses it and that is sufficient to make him liable to income tax, 5 & 6 Vict. c. 35, s. 63, No. 9, rule 2. Whether, although occupying, he is exempt on any ground, is quite a different question, but what the Court are invited to do is to say that a man who lives in a house with his family, and has the key of the door, and pays a rent (1), does not occupy it, which is a contradiction in terms. The question which was to have been argued here was the question of exemption, but that would not arise if the appellant is decided not to occupy.

KELLY, C.B. The question in this case is, whether the appellant is the occupier of the premises in question within the meaning of the Inhabited House Duty Act, or within the meaning of the Income Tax Act, and it appears, according to the statement of the case before us, that the appellant has been assessed under both statutes in respect of the year's occupation from April, 1875, to April, 1876, and that the sums payable to the Crown in respect of the assessments, if they could be sustained, would be payable in January, 1876. The question we have to determine is, whether the occupation and the use of these premises by the appellant, in the manner and under the circumstances stated in this case, render him liable to either the one or the other of these assessments. I am clearly of opinion that he is not liable. If the case were confined to what is stated in paragraph 10 of the case, a question might well arise as to whether he might or might not be liable. But when we refer to paragraph 7, we find that the appellant, as an officer of the constabulary of Lancashire, is, by the duties of his office, and under the circumstances in which he holds that office and is paid a salary, compelled to live on the premises in question; that the house in which he resides is liable to be used for such purposes connected with the police force as the chief constable of the county may direct; and that the appellant is further liable to be removed from station to station at any time.

(1) It did not appear by the case how or when the rent of 10*l*. 8*s*. was paid by the appellant.

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Now, any one of these portions of this paragraph would, in my opinion, be fatal to the argument on the part of the Crown, that the appellant has such an occupation of these premises as to render him liable to either of these assessments. A man who pays rent for premises has the right to occupy the premises under a contract between himself and the landlord, to whom, under the contract between them, he is bound to pay the rent. No such case exists here. This, though it is called a rent in the statement of the case before us, is clearly no rent at all; it is stated that the appellant is an officer of the constabulary, and that he is compelled to live upon these premises, but while he enjoys a lodging which probably saves him the rent of some lodging elsewhere, it amounts to nothing more than this, that the authorities by whom he is employed think fit to deduct from the salary that they pay him a certain sum, namely, 10*l.* 8*s.* a year, in consequence of the benefit that he derives from lodging in this house with his family during whatever time they may compel him to remain there. That is not a rent at all, it is not a tenancy at all, it is not an occupation at all in respect of the Acts which regulate and determine either of these assessments, and therefore, were it upon that ground alone, I should hold that this is not an occupation within the meaning of either of these Acts of Parliament. But the case says further, "that the house in which he resides is liable to be used for such purposes connected with the police force as the chief constable of the county may direct." Under this power the chief constable might, either upon a particular occasion or on any number of occasions, where the proper conduct of the business of the police might require it, send any number of persons who might be taken into custody, and who were to remain in custody until the following morning before they would be taken before the magistrate, into this house, to the exclusion of the appellant. That also is inconsistent with the beneficial occupation or use of the house by a tenant who is liable to assessment under these Acts of Parliament. But then, when we come to the last provision in the 7th paragraph, we find that "the appellant is further liable to be removed from station to station at any time." Here is a man assessed to the Income Tax for the year, and assessed to the inhabited house duty for the

year, who might if it were thought fit, a week or a month, or even a single day, after the assessment, be removed to another place altogether, and might not occupy the house for a single day after the notice or the command is issued to him to quit the station and remove himself to another station. It is not arguable that this could be an occupation within the meaning of these Acts of Parliament. I am clearly of opinion, therefore, that he is not an occupier, but is merely a servant of the constabulary put into the house for their purposes, with liberty and permission to live in that house just as long as they think fit, and no longer: just as long as it answers their purposes and suits their public duties to leave him there, or desire or compel him to remain there, and no longer; and again, just as long as they may think it expedient that he should remain an officer in their establishment and not be removed to another station, and no longer. Under these circumstances, it clearly is not an occupation within these statutes.

CLEASBY, B. I must say that I was a good deal surprised at the statement of the learned counsel for the Crown that the point intended to be raised here was a different one from that which we are now considering. I refer to the case, and I see that this is the only point upon which the case is stated in paragraph 15: "After considering the statements of the appellant and the surveyor, the commissioners were of opinion that the superintendent was the servant of the county and not of the Crown, and that the house being separate and distinct from the police station (the only communication being by a door in the yard wall to the drill ground), and being furnished by the superintendent at his own expense, was liable to be assessed upon its full annual value." They state everything connected with the place to shew in what way it is connected with the police station, and not deciding anything upon the other question, the commissioners decide that it is to be regarded as if he were living apart from the police station altogether in a street in the town. If it were so, it would be quite a different thing, although he were paid by the police authorities, or there were an allowance made for it, and though he might be removable to a different station. The commissioners hold that he occupies

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premises so separated from the police premises as to make him liable to be assessed. Upon that, which is mainly a question of fact, we come to a different conclusion. What we have to consider is simply this: is he to be regarded as a person occupying or living upon these premises in any different manner from this, that he is allowed to live there upon part of the police premises? No one would contend, if the entrance were within the wall of the police premises, over which, of course, the police authorities would have the exclusive control, that the appellant was the occupier of the house, though he was the only person living in it. How can it make a difference if, for the more convenient enjoyment by their servant of the particular house—because it is to their interest to have servants who are satisfied and pleased with the conveniences that they enjoy—besides all the internal communication requisite for the discharge of his duties, they allow him to have an outer door into the footpath or street?

POLLOCK, B., concurred.

Judgment for the appellant.

Solicitors for appellant: *Ridsdale, Craddock, & Ridsdale, for Birchall, Wilson, & Hulton, Preston.*

Solicitor for the Crown: *Solicitor of Inland Revenue.*

Nov. 19.

[IN THE COURT OF APPEAL.]

HYDE *v.* WARDEN.

Specific Performance—Underlease—Waiver of Objection to Title—Constructive Notice of Provisions in Original Lease—Qualified Covenant not to assign or underlet without Consent—Clause of Re-entry not applicable to Negative Covenants—Usual Covenant—Covenant not to mow Meadow Land more than once a Year—Clause of Re-entry in case of Bankruptcy, Composition with Creditors, or Execution issued against Lessee—Merger—Reversion.

5 C.P.D. 145, 6
15 C.D. 101
16 C.D. 390

Where a parol contract is made for the grant of an underlease subject to a question of title, possession taken with the knowledge and consent of the grantor is not of itself a waiver of an objection to title by the grantee, but it is only evidence of the acceptance of the title, which may be rebutted by other circumstances.

Upon an agreement to grant an underlease the grantee has constructive notice

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of the provisions of the original lease only when he has had a fair opportunity of ascertaining what they were.

Where a lease provides that the lessee shall not assign or underlet without the consent in writing of the lessor, which, however, is not to be withheld from any assignment or underlease to a respectable and responsible person, it is unnecessary to the validity of an assignment or underlease to a person of that character that the consent of the lessor should be first obtained.

Semble, that a power of re-entry, upon the lessee wilfully failing or neglecting to perform any covenant, does not apply to a breach of a negative covenant.

In a lease of a farm a covenant not to mow meadow land more than once a year is not an unusual covenant, so as to excuse an intended assignee from accepting the title. But a power of re-entry in a lease, if the lessee and his assigns become bankrupt, or make a composition with creditors, or if execution should issue against either of them, is unusual, and an intended assignee is not bound to accept an assignment of a lease containing such a covenant.

Where a lessor, being himself a tenant for years, grants to his sub-lessee the residue of his interest from the termination of the existing sub-lease, the grant operates as an interesse termini, and the existing sub-lease does not merge; and a right of re-entry contained in the original lease would still exist and enable the lessor to re-enter for breach of covenant.

Semble, where two pieces of land are demised by one lease containing a power of re-entry over both, and afterwards the reversion in one of them is assigned to the lessee, the right of re-entry remains intact over the piece of land of which the reversion remains vested in the lessor.

APPEAL from the decision of the Exchequer Division, dismissing a motion that judgment should be entered for the plaintiff.

It was an action to enforce a specific performance, or, in the alternative, to recover damages for breach of a parol contract, alleged by the plaintiff to have been entered into by the defendant to accept a lease of a certain farm.

The facts of the case, the course at the trial, and the arguments of counsel are fully noticed in the judgment.

1876, 20, 21 Dec., and 1877, 15 Jan. *Fry, Q.C.*, and *Bompas* (*Langworthy* with them) for the plaintiff.

Sir H. S. Giffard, S.G., and *Serjt. Ballantine* (*Finlay* with them), for the defendant.

In addition to the cases mentioned in the judgment, the following were cited: *Clive* v. *Beaumont* (1); *Gaston* v. *Frankum* (2); *Upperton* v. *Nickolson* (3); *Mundy* v. *Jolliffe* (4); *Wilson* v. *Hartle-*

(1) 1 De G. & Sm. 397.
(2) 2 De G. & Sm. 561.
(3) Law Rep. 6 Ch. 436.
(4) 5 My. & Cr. 167.

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pool Ry. Co. (1); *Palmer* v. *Edwards* (2); *Baker* v. *Gostling* (3); *Tilley* v. *Thomas* (4); Shelford's Real Property Statutes, 8th ed., by Carson, at p. 711, n.; Co. Lit. 215 *a*, 303 *b*.

As to the production of further evidence at the hearing, the plaintiff's counsel referred to Order LVIII., Rule 5, and *Hastie* v. *Hastie*. (5)

Cur. adv. vult.

1877. Nov. 19. BRETT, L.J., read the judgment of Cockburn, C.J., and Brett, L.J. (6)

16 Ch D 390

This action was brought to enforce a specific performance, or in the alternative to recover damages for breach of a parol contract, alleged by the plaintiff to have been entered into by the defendant to accept a lease of a farm in Sussex, called Freek's Farm, under the following circumstances.

By an indenture dated the 10th of October, 1870, and made between Robert Collins Bayntun of the one part, and John Nicholas of the other part, in consideration of the rent and covenants thereinafter reserved and contained, and on the part of Nicholas, his heirs, executors, administrators, and assigns, all of whom were thereinafter included in the word lessee, to be paid and observed, Bayntun granted to Nicholas a lease of the said Freek's Farm, therein described as a portion of a larger farm of the same name, and also of another farm called Bridge Farm, which was adjoining or near to Freek's Farm, for the term of fourteen years from the 29th of September, 1870, at one undivided rent of 330*l*. per annum. The lease contained among other covenants not necessary to be stated, a covenant on the part of the lessee not to mow meadow land more than once in a year, and not to assign or underlet the said premises or any part thereof for all or any part of the term without the previous consent in writing of the lessor, such consent, however, not to be withheld from any assignment or underlease to any respectable and responsible person. There was also a proviso that if at any time

(1) 2 De G. J. & S. 475.
(2) 1 Dougl. 187 n.
(3) 1 Bing. N. C. 27, 251.
(4) Law Rep. 3 Ch. 61.
(5) 1 Ch. D. 562.
(6) The case was argued before Cockburn, C.J., Brett and Amphlett, L.JJ.; the judgment was prepared by Sir Richard Amphlett, who had resigned before it was delivered.

the rent should be in arrear, or if the said lessee should wilfully fail or neglect to perform any of the covenants and agreements on his part to be done and performed, or if the lessee should become bankrupt or make any composition with his creditors, or if any execution should issue against him, in either of such cases the lessor might re-enter.

By an indenture dated the 22nd of December, 1871, Nicholas assigned the said lease to one Mills, and by another indenture dated the 10th of October, 1873, Mills assigned the same to the plaintiff. The rent of 330*l.* reserved by the lease appears to have been under some circumstances not stated to us, and doubtless immaterial so far as this action is concerned, reduced to 310*l.* which will therefore be hereinafter referred to as the actual rent payable under the said lease.

It may be useful to observe, with reference to the contention between the parties on some points in this case, that Bayntun was the freeholder of Freek's Farm, but that he only held the Bridge Farm under a lease, dated the 6th of January, 1869, from two persons named Benjamin Alfred Arnold, and Charles Edwin Ogden, for twenty-one years from the 29th September, 1868, which would therefore expire on the 29th of September, 1889, just five years after the expiration of the said lease from Bayntun to Nicholas of the 10th of October, 1870.

The plaintiff for some time after the said assignment to him from Mills occupied both the said farms himself, but in the spring of 1875 he became desirous of underletting Freek's Farm, and hearing that the defendant, who was a gentleman of respectability living in a house very near to Freek's Farm, had been making some inquiries with a view of taking it, the plaintiff wrote to the defendant a letter dated the 11th of May, 1875, in which he said that he had decided to let Freek's Farm, and amongst other things stated expressly that the rent he paid for it was 220*l.* per annum.

A negotiation then ensued between the plaintiff and the defendant for an underlease of Freek's Farm, and on the 18th of May they went over the farm together, and in answer to an inquiry from the defendant the plaintiff informed him that he held the same under a lease of which he believed eight or nine years to be unexpired, and that he was willing to transfer to the defendant

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the remainder of his term on the same terms and conditions as those on which he held it. In fact, however, the plaintiff held under no separate lease of Freek's Farm at the rent of 220*l.* or any other sum, but as has been stated held both Freek's and Bridge Farms as assignee of the lease from Bayntun to Nicholas of the 10th of October, 1870, at an undivided rent of 310*l.* per annum. It follows that either farm might be distrained upon for the whole of this amount; and the tenant of either farm might be evicted for a breach of covenant committed by the tenant of the other.

On the same 18th of May, after going over the farms, the plaintiff and defendant went together into the defendant's house; and it was there arranged that the defendant should take the farm upon the terms offered by the plaintiff, and that complete possession should be given to the defendant on the 24th of June then next. It was further agreed that the defendant should also have the right of sporting over the farm on payment of 100*l.*, being the same sum which the plaintiff had paid for it to Bayntun, and that certain provisions should be made for the valuation of stock and crops, to be taken to by the defendant, which are not necessary to be here stated.

There is no dispute as to the terms of this arrangement; but the plaintiff has all along contended that the arrangement was a final and concluded agreement, while the defendant contends that it rested on negotiation only, and was subject to the approval of his solicitors. A draft agreement was afterwards sent by Messrs. Parkers, the plaintiff's solicitors, to the defendant accompanied by a letter dated the 25th of May, 1875, which was as follows: "At the request of Mr. Hyde, of Bridge House Farm, who we understand has agreed to let you Freek's Farm for the rest of his tenancy, we have prepared, and herewith send you, the draft of such agreement as we think should be signed between yourself and Mr. Hyde. Would you kindly peruse it, and as we presume you will wish to have it approved by your solicitors, forward it to them and request them to return it approved to us."

On the same 25th of May, the defendant, being in want of keep for his cows, obtained the plaintiff's consent to take possession of one of the fields belonging to the farm, and turned out his cows therein, and with the knowledge and without any objec-

tion on the part of the plaintiff, made a cesspool thereon for the convenience of his house, and exercised other acts of ownership thereon; and on the 24th of June, the day fixed for that purpose, the defendant was let into possession by the plaintiff of the remaining part of the farm.

In the meantime the defendant's solicitors, Messrs. Black, Freeman, & Gell, to whom the defendant had sent the draft agreement, requested Messrs. Parkers to furnish them with a copy of the lease, referred to in the draft as that under which plaintiff held (being the lease from Bayntun to Nicholas of the 10th of October, 1870), and the same was sent to them on the 3rd of June, 1875.

On the 14th of June Messrs. Black, Freeman, & Gell, in reply to a letter from Messrs. Parkers pressing for a return of the said draft approved, wrote to them as follows: "Warden and Hyde. In reply to your favour of Saturday, the terms of the original lease are of such a nature that we really cannot advise Mr. Warden to accept the tenancy. We hope to-morrow to return your draft with our remarks thereon, to see whether the superior landlord can release any of the covenants. Some of them are extremely objectionable, viz., the power to resume for building purposes, and the determination on the bankruptcy of the lessee, and there are some other points as to the farm."

On the 19th of June Messrs. Black, Freeman, & Gell returned the copy-lease, having placed marginal notes against the clauses to which they objected.

The only objections so taken which were relied upon by the defendant in the argument before us, and to which, therefore, we may confine our attention, were, first, to the covenant not to mow meadow land more than once a year, it being suggested that there could be no objection to mowing more than once a year if an equivalent was put on the land; and secondly, to the provision giving a right of re-entry if the lessee should become bankrupt or make any composition with his creditors, or if any execution should issue against him.

An interview afterwards took place between the solicitors, when the objections to the provisions of the lease were discussed, and on the 28th of June Messrs. Parkers wrote to Messrs. Black, Freeman, & Gell a letter containing the following passage: "After

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seeing you on Saturday last we called upon Mr. Waugh, at Cuckfield. Mr. Waugh is Mr. Bayntun's solicitor, and on our explaining matters to him, he has agreed to grant an entirely new lease of Freek's Farm to Mr. Hyde, omitting the clauses to which you object, with the exception of the clause relating to the not mowing of the pasture more than once in a year. This Mr. Waugh will not give way upon, although we offered that an equivalent in manure should be put upon the land. We hope, therefore, you will see your way to waiving this objection." In a letter of the 1st of July, 1875, Messrs. Black, Freeman, & Gell suggested to Messrs. Parkers that if a new lease were to be granted it should be to the defendant direct. This suggestion was communicated by Messrs. Parkers to Mr. Waugh, the solicitor for Bayntun, in a letter dated the 2nd of July, with an intimation that on behalf of the plaintiff they did not see any objection to that suggestion being acted upon.

Various attempts were thereupon made on the part as well of the plaintiff as of the defendant, who at that time, at all events, was very anxious to take the Freek's Farm, to obtain a new lease from Bayntun, which it was stated in Messrs. Parker's letters of the 28th of June he had agreed to give, and a long correspondence ensued on the subject between Messrs. Parkers, Messrs. Black, Freeman, & Gell, and Mr. Waugh, Bayntun's solicitor, which it is unnecessary further to notice; but it was ultimately found impossible to obtain any such new lease, either to the plaintiff or direct to the defendant, except upon terms to which the plaintiff would not submit; and, in consequence, the defendant, in the month of August, declined to accept the proposed underlease from the plaintiff alone, and offered to re-deliver possession of the farm, which was at first declined by the plaintiff, but was afterwards accepted upon the terms that such acceptance should be without prejudice to the rights of the parties.

Under these circumstances, this action was commenced on the 21st of August, 1875, seeking the specific performance of the parol contract, and the same came on for trial before Lord Coleridge at Lewes on the 9th of March, 1876.

It was not disputed that if there was a concluded parol agreement, the taking possession and acts of ownership were sufficient

to take the case out of the Statute of Frauds; and the only issue of fact on that trial was whether there had been such a concluded agreement, or, as the defendant contended, only a negotiation for an agreement; and upon that issue a verdict was found for the plaintiff. It was assumed throughout the trial by all parties that the question of title was to be left open, and not affected by a verdict in favour of the contract; and, accordingly, Lord Coleridge did not direct judgment to be entered, but reserved liberty to either party to apply to the Court above for judgment, when the question of title would be more conveniently discussed.

The cause accordingly came on before the Exchequer Division on the 24th of May, 1876, upon a motion by the plaintiff that judgment should be entered for him for the specific performance of the agreement, and for consequential directions, and upon a motion on the part of the defendant to make absolute a rule nisi which he had obtained for a new trial, and the Court being of opinion that the plaintiff was not in a position to grant such an underlease as the defendant was entitled to without the assistance of the superior landlord, which could not be obtained, directed judgment to be entered for the defendant without costs, and that the plaintiff should have his costs up to the time of the payment of a certain sum of money into court, in respect of damage alleged to have been done by the defendant while in possession, and as to which no further question arises.

This decision was challenged by the present appeal on the part of the plaintiff; and the defendant gave notice that on the hearing of such appeal he should apply that the judgment of the Exchequer Division might be varied, by directing the plaintiff to pay to the defendant the defendant's costs of the action; and that he should, if necessary, rely upon the rule for a new trial (on which no opinion was expressed by the Exchequer Division), and apply to the Court of Appeal for a new trial accordingly, or for judgment upon the ground, that no agreement was proved which was sufficiently complete to be subject of a claim for specific performance, as well as on the grounds on which judgment was given by the Exchequer Division.

Before discussing the objections raised to the plaintiff's title, it will be as well to notice the contention of the plaintiff that the

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defendant had by taking possession accepted the title. We think that this contention cannot be sustained. For where possession is taken, as in this case, with the knowledge and consent of the grantor, it amounts only to evidence of an acceptance of the title, which may be rebutted by circumstances shewing that it was not intended by the parties to have that effect. In this case we think that the conduct of the parties shews conclusively that there was no such intention; since at the time when possession was given of the main part of the farm, on the 24th of June, objections to the title had been distinctly raised by the defendant's solicitors, and correspondence respecting the same between the solicitors was continued for a considerable period after such possession had been taken. In fact, although the taking possession was in such correspondence, and throughout the proceedings in the action, insisted upon as a part performance, so as to take the case out of the Statute of Frauds, it was never alleged on behalf of the plaintiff, until the hearing of the appeal before us, that such taking possession had the further effect of being an acceptance of the title.

But then it was urged on the part of the plaintiff that the defendant by contracting for an underlease, must be taken to have had constructive notice of the provisions of the original lease, when he took possession of a portion of the premises on the 25th of May; and that at least all objections apparent on the face of the lease were thereby waived; and the case of *Cosser* v. *Collinge* (1) was relied upon in support of that proposition. But we think it may be considered as settled that the principle of that case can only be applied where (as indeed was the fact in *Cosser* v. *Collinge* (1)), the defendant had a fair opportunity of ascertaining for himself the provisions of the original lease: see *Grosvenor* v. *Green* (2); *Smith* v. *Capron.* (3) In the present case there was no such fair opportunity before the copy lease was sent to the defendant's solicitor as hereinbefore mentioned. For the contract was made at the defendant's house, when it is not pretended that the plaintiff had with him the lease, or any copy; and, indeed, the fact that the plaintiff (as he admits)

(1) 3 My. & K. 283. (2) 28 L. J. (Ch.) 173.
(3) 7 Hare 185.

informed the defendant that he held Freek's Farm on a lease at 220*l.* per annum, which was entirely incorrect, affords abundant evidence that such lease was not produced, or its provisions properly explained to the defendant, at the time the contract was entered into. It is true that the defendant had not merely constructive but actual notice of the provisions of the original lease, when he took possession of the remaining part of the property on the 24th of June; but that, as has been already observed, was after certain specific objections to those provisions had been taken and had become the subject of a correspondence between the solicitors, which continued for some time afterwards without any waiver of such objections being insisted upon or even mentioned.

Under these circumstances we are of opinion that the specified objections to the provisions of the original lease have not been waived, and must be considered on their merits.

It is quite a different question whether it is now open to the defendant to take other objections to those provisions, not specified in the margin of the copy lease when returned by the defendant's solicitors. We are of opinion that it is not so open to him, where such objections were known and might have been insisted on before possession was taken, and that such objections, even if valid, ought to be considered to have been waived. This disposes of one objection urged before us to the title which would otherwise have been fatal, viz., that the original lease was not, as represented, a lease of Freek's Farm only at a rent of 220*l.*, but of the two farms at one undivided rent of greater amount. For this objection was patent on the lease itself, and yet was not noticed in the margin of the copy lease when returned, nor, indeed, at any time during the correspondence which ensued, and must therefore, we think, be considered as having been waived by the taking of possession.

We proceed to consider the objections taken to the title which have not been waived. The first was that there was no evidence of the consent in writing of Bayntun or his mortgagees to the proposed underlease. We think that this objection cannot be sustained. It was stipulated that such consent should not be withheld from an assignment or underlease to a respectable and responsible person; and no imputation has been made against the respectability or responsibility of the defendant; and consequently any

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attempt on the part of Bayntun or his mortgagees to eject the defendant, on the ground that no consent in writing had been given, would fail: see *Treloar* v. *Bigge*. (1) Moreover we should, if it were necessary, be prepared to hold that the contention of the plaintiff is correct, that the power of re-entry, being only in the event of the lessee "wilfully failing or neglecting to perform any of the covenants," does not apply to a breach of a negative convenant: see *West* v. *Dobb*. (2)

The only remaining objections necessary to be considered are those taken to two of the provisions of the lease, viz., the unqualified covenant not to mow meadow land more than once a year, and the power of entry in case of the bankruptcy, &c., of the lessee, both of which provisions were said on behalf of the defendant to be unusual and unreasonable. With regard to the first of these provisions we think that the objection fails. For although it is undoubtedly very common in farming leases to qualify a covenant not to mow meadow land more than once a year, by excepting from its operation cases where an equivalent in the shape of manure is brought on the land, it is by no means invariable to do so, and in our opinion the omission of such qualification is not sufficient to make the covenant so unusual or unreasonable as to give a right to the defendant to object to the title on that account. But, as to the other provision objected to, namely, the power of re-entry not only if the lessee (which word is expressly declared to include assigns) should become bankrupt, or make any composition with his creditors, but also if any execution should issue against him, such provision appears to us unusual and unreasonable, especially in the present case, where the defendant would be liable to be evicted for breach of the condition not only by himself, but by the original lessee Nicholas, of whose circumstances he might very probably know nothing. The Court, therefore, ought not in our opinion to compel the defendant to take an underlease if he would thereby be exposed to such a liability.

So matters stood upon the evidence presented to the consideration of the Court below; but the plaintiff, in pursuance of notice, applied to us for leave to produce additional evidence, for the

(1) Law Rep. 9 Ex. 151. (2) Law Rep. 5 Q. B. 460.

purpose of shewing that there had been a severance of the reversion in the two farms comprised in the original lease from Bayntun to Nicholas, which, according to the doctrine established in *Knight's Case* (1), and in *Twynam* v. *Pickard* (2), would destroy the power of re-entry reserved in the lease, and thus cure the defect in the title lastly discussed; and the defendant not objecting, we allowed such additional evidence to be given. It consisted of three indentures, the effect of which it will be convenient to consider separately.

The first of these indentures, dated the 21st of January, 1874, was made between Bayntun of the one part, and the plaintiff of the other. By this indenture, after reciting the assignment of the 10th of October, 1873, from Mills to the plaintiff of the residue then unexpired of the term granted by the lease from Bayntun to Nicholas, of the 10th of October, 1870, and that Bayntun had agreed to grant to the plaintiff an extension of his term, so far as regarded Bridge Farm, together with certain rights of sporting not affecting the questions arising in this action, it was witnessed (amongst other things) that Bayntun demised to the plaintiff the Bridge Farm for a term of five years from the 29th of September, 1884 (that being the day when the former lease of the 10th of October, 1870, would expire), but subject to the last-mentioned lease, as long as the same should subsist, at the rent of 180*l.* during the said term of five years thereby granted, being an improved rent of 100*l.* over and above the 80*l.* reserved in the original lease of Bridge Farm to Bayntun of the 6th of January, 1869. It was argued on the part of the plaintiff that, as the further lease of Bridge Farm for five years from the 29th of September, 1884, would expire at the same time as the original lease of the Bridge Farm to Bayntun of the 6th of January, 1869, such further lease would, according to the decisions of *Parmenter* v. *Webber* (3) and *Beardman* v. *Wilson* (4), amount to an assignment of the original lease, and thus effect a severance of the reversion. But it will be observed that such further lease is not to commence until the 29th of September, 1884, when the former lease from Bayntun to Nicholas, and then vested in the plaintiff, would expire. It was not, there-

(1) 5 Rep. 54 *b*.
(2) 2 B. & A. 105.
(3) 8 Taun. 593.
(4) Law Rep. 4 C. P. 57.

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fore, a lease of the reversion but a reversionary lease, or in other words an interesse termini, which is only a right and not an estate, and, according to a well-established principle of law, would neither cause nor prevent a merger. In the meantime, therefore, until the interesse termini ripens into an estate, which will not be until the expiration of the lease of Bayntun to Nicholas, the reversion will continue in Bayntun, and there will be no severance, and consequently no destruction of the right of re-entry. In fact, until that time it cannot be ascertained whether the further lease will or will not operate as an assignment; for if, during the pendency of the lease from Bayntun to Nicholas, Bayntun should obtain from the superior landlord an extension of his term in Bridge Farm, his further lease to the plaintiff would undoubtedly operate according to its purport as an underlease, and not as an assignment. Moreover, the grant of the further lease is expressly made subject to the former lease from Bayntun to Nicholas of the 10th of October, 1870, which, even if the said grant had operated as an immediate assignment of the reversion in Bridge Farm, would have kept alive the right of re-entering over Bridge Farm, and à fortiori over Freek's Farm, even if it would have been otherwise destroyed: see the case of *Doe* v. *Bateman* (1), where it was held that if A., being possessed of a term of years, demised his whole interest to B., subject to a right of re-entry on the breach of a condition, A. might, by virtue of the agreement between the parties, re-enter for the condition broken, although he had no reversion.

The second of the said indentures relied upon by the plaintiff, dated the 9th of September, 1875, was made between the said Benjamin Alfred Arnold and Charles Edwin Ogden of the first part, one Sarah Ann Arnold of the second part, the plaintiff of the third part, and Bayntun of the fourth part. After reciting the lease of the Bridge Farm from Arnold and Ogden to Bayntun of the 6th of January, 1869, and that, under and by virtue of the lease from Bayntun to Nicholas of the 10th of October, 1870, and of the assignment thereof from Mills to the plaintiff of the 10th of October, 1873, and of the further lease from Bayntun to the plaintiff of the 21st of January, 1874, the plaintiff was lessee or assignee under Bayntun of the Bridge Farm for the residue of the term

(1) 2 B. & A. 168.

created by the lease from Arnold and of Ogden to Bayntun of the 6th of January, 1869, and of other hereditaments the property of Bayntun (meaning Freek's Farm) at a rent of 310*l.* until Michaelmas 1884, and thereafter at the rent of 180*l.* for the Bridge Farm alone during the residue of the term; and further reciting that on the 18th of January, 1875, an action of ejectment had been commenced by Arnold and Ogden and Sarah Ann Arnold against Bayntun and the plaintiff for the recovery of the possession of Bridge Farm, for an alleged forfeiture by breaches of several of the covenants contained in the lease of the 6th of January, 1869, and reciting that by an order made in the action by consent of all parties thereto, it was ordered that the proceedings in the action should be stayed upon the terms following, that was to say: 1. Hyde to continue tenant of the Bridge Farm. 2. Bayntun to assign from Lady-day, 1873, all his interest in the lease from Arnold and Ogden to himself, with the license and approval of Arnold and Ogden, such assignments to be prepared by their solicitor, and the costs thereof to be paid by Hyde. 3. Arnold and Ogden to waive all claims in respect of any breach or breaches of covenant under the lease, and Hyde to be allowed till Michaelmas, 1876, to remedy existing breaches of covenant. 4. Hyde to pay Arnold and Ogden direct the rent payable under the lease. 5. Bayntun to be released by Arnold and Ogden from all liability in respect of covenants in the lease, past or future. 6. All payments of rent made under provision 4 by Hyde to Arnold and Ogden to be allowed by Bayntun in settling rent as between Hyde and Bayntun. By 7, 8, and 9 certain payments are provided for, not necessary to be here stated. 10. Subject to provisions 4 and 6, the rights to and relating to the recovery of rent, whether by action, distress, or otherwise, from Hyde to Bayntun, to remain as under existing leases from Bayntun to Nicholas and Bayntun to Hyde, it was witnessed that Arnold and Ogden and Sarah Ann Ogden, in pursuance of the order, and in part performance thereof, released Bayntun from all the covenants, clauses, and agreements in the recited indenture of lease contained, and from all liability, past, present, and future in respect thereof, provided that nothing therein contained should extend to put an end to or determine the lease or the indenture of the 10th of October, 1870, the 10th of October,

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1873, and the 21st of January, 1874, or otherwise vary or affect the same, save as appeared by those presents, or to release or discharge the plaintiffs in the recited action from payment to Bayntun of the improved rent reserved under the last mentioned indenture during the then residue of the term granted by the indenture of lease of the 6th of January, 1869, or to in any way diminish or prejudice the right of Bayntun to and relating to the recovery of such rent, save that the plaintiff should pay direct to the persons entitled thereto the rent of 80*l.* reserved by the lease of the 6th of January, 1869, instead of paying the same through Bayntun.

It was contended on behalf of the plaintiff that the effect of the indenture, taken in conjunction with the consent order in the action therein recited, was in equity to transfer all Bayntun's interest in Bridge Farm to the plaintiff, except only the rights to and relating to the recovery of rent under the lease from Bayntun to Nicholas of the 10th of October, 1870, and under the further lease of Bayntun to the plaintiff of the 21st of January, 1874, and thus to create a complete severance of the reversion in the two farms. Now assuming this construction of the indenture and order to be correct, which we think it is, subject to an observation to be made presently as to the terms in which an actual assignment of such interest would probably be directed by the Court, still the question arises whether the assignment by the lessor of the reversion in one of two farms comprised in the same lease to the lessee himself falls within the principle of *Knight's Case* (1), so as to destroy the right of re-entry over both farms. Although we are not aware of any authority one way or other on the point, we think that it has not that effect. Where, indeed, the reversion is so dealt with as to be vested in two different persons (other than the lessee himself) the inconvenience and hardship upon the lessee of being exposed to two actions of ejectment for breach of any condition in the lease may well explain and justify the rule; but where the reversion of one of the farms is assigned to the lessee himself, there is obviously no such inconvenience or hardship. Such an assignment would cause a merger and determination of the term in the farm of which the reversion

(1) 5 Rep. 54 *b*.

is so assigned; but as both the term and reversion would continue in the other farm, it is not easy to assign any satisfactory reason why the right of entry and other incidents to the reversion in that farm should not also remain intact. But, further, if there is any doubt on this point, it must be observed that Bayntun has not yet executed any assignment of his interest in the lease of Bridge Farm of the 6th of January, 1869, as directed by the order in the action hereinbefore recited; and I think that no such assignment would be directed by the Court, if applied to, without providing that it should not affect the right of re-entry over Freek's Farm, which it clearly was not the intention of either party to disturb.

The third and last of the indentures relied upon by the plaintiff was dated the 3rd of March, 1876, and was made between Arnold and Ogden, of the first part, Sarah Ann Arnold, of the second part, and the plaintiff, of the third part, whereby it is recited that the Bridge Farm has become vested in the plaintiff for the residue of the term of twenty-one years granted by the lease of the 6th of January, 1869, to Bayntun, and fresh arrangements are come to between the lessors and the plaintiff upon that footing, but as Bayntun was no party to that deed, his rights cannot be affected by its contents, and no further notice therefore need be taken of it.

Under the circumstances it appears to us that none of those deeds have the effect contended for of destroying Bayntun's right of re-entry over Freek's Farm in the event of the bankruptcy, &c., of the lessee, and the objection to the title on that ground is therefore not cured. No doubt with the assistance of Bayntun this objection could be removed and a good title could be made; and we are pressed to direct a general inquiry as to title in order that the plaintiff might have an opportunity of trying again to obtain Bayntun's concurrence. But no evidence was adduced before us that there was a better prospect of obtaining it now than when he refused it in 1875; and considering that Freek's Farm was, as both parties know, required for the defendant's immediate occupation as a farm, we quite agree with the judgment of the Court below, that it would not be right or just to the defendant to allow further delay upon the mere chance of obtaining such concurrence.

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It remains to consider the cross notice of the defendant. That part of the motion, which sought to have the judgment of the Court below varied with respect to the costs, was abandoned by counsel on the hearing of the appeal; and the view we have taken in the question of title makes it unnecessary for us to express any opinion on the rest of the motion, and we think, under the circumstances, that no costs ought to be given of the motion to either side.

On the whole, we think the decision of the Court below was right and must be affirmed; and that the appeal must be dismissed with costs; and that no order ought to be made as to the defendant's cross motion as to costs or otherwise.

Judgment affirmed.

Solicitors for plaintiff: *Black, Freeman, & Gell.*
Solicitors for defendant: *Parkers.*

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THE GUARDIANS OF THE POOR OF THE WESTBURY-ON-SEVERN UNION, APPELLANTS; THE OVERSEERS OF THE POOR OF THE PARISH OF BARROW-IN-FURNESS, RESPONDENTS.

Poor Law—Settlement by Derivation—Poor Law Amendment Act, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.

6 QBD 587
7 QBD 389
8 QBD 161-2
9 QBD 768
779
11 QBD 317

The 1st paragraph of s. 35 of the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), which abolishes derivative settlements, except in the case of a wife from her husband, and of a child under the age of sixteen from its parent, is to be read retrospectively as well as prospectively, both in the enacting part and in the exception.

A pauper born in 1841 had while under the age of sixteen and before the passing of the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), derived a settlement from his father, who had acquired a settlement by estate, and the pauper never acquired any settlement of his own:—

Held, that though the enacting part of the 1st paragraph of s. 35 of that Act would, but for the exception, have destroyed the derivative settlement, the case fell within the exception, and that the pauper therefore retained the derivative settlement after the Act.

SPECIAL CASE stated by consent, and by order of Lopes, J., in pursuance of 12 & 13 Vict. c. 45, s. 11.

On the 27th of October, 1877, the respondents obtained an

order of justices of the county of Lancaster (within which county the parish of Barrow-in-Furness is situated), adjudicating the settlement of James Dorrington, a lunatic pauper, to be in the parish of East Dean, in the county of Gloucester, and in the appellant union.

1. The lunatic is the legitimate son of Thomas and Ann Dorrington, and was born at Littledean Hill, in the county of Gloucester, on the 31st of March, 1841, which place at the time of the birth and till the passing of 5 & 6 Vict. c. 48, was extra-parochial, but was included in the parts of the Forest of Dean which by that statute became a township under the name of East Dean.

2. The pauper never acquired a settlement in his own right, but resided with his father until he was upwards of seventeen years of age.

3. The father of the pauper, before the pauper had attained the age of sixteen years, viz., in 1855, was seized of a certain dwelling-house situate at Bilson Green, in the township of East Dean, in the county of Gloucester, and in the appellant union, and so continued seized thereof until 1862, and resided and slept in that township in such dwelling-house for forty days during the time he was so seized thereof.

The respondents contend, and the appellants deny, that the pauper upon the above facts is settled in the township of East Dean in the appellant union.

The question for the opinion of the Court is whether on the above facts the legal settlement of the pauper is in the township of East Dean. If the Court should be of opinion in the affirmative, the order of justices is to stand, if otherwise, to be quashed.

The case was argued between counsel as if it had expressly stated that the pauper had acquired from his father a derivative settlement in the township of East Dean, and would therefore be removable to the appellant union, if the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), had not passed, and that the only question was upon the construction of that statute.

Jan. 29. *Anstie* (*J. D. Greene* with him), for the appellants. The question is whether s. 35 of 39 & 40 Vict. c. 61, has destroyed the derivative settlement within the appellant union which the

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pauper had acquired from his father. The appellants contend that it has. Sects. 34, 35, and 36 must be read together. (1) Sect. 34 turns irremovability into settlement. Sect. 35 abolishes derivative settlements except in certain cases. Sect. 36 provides that the provisions of the Act as to settlement shall not have a retrospective effect in certain cases (of which the present is not one), and therefore implies that they shall have a retrospective effect in all other cases. Now, there are but two sections in the Act relating to settlement, ss. 34 and 35, and it has been decided in *Reg.* v. *Guardians of Ipswich Union* (2), that s. 34 is not retrospective. There remains, therefore, nothing to which s. 36 can be applicable except s. 35, and this shews that s. 35 must have some retrospective operation. The opening words of that clause, therefore, destroy the derivative settlement which the pauper acquired, before the passing of the Act, in the appellant union. But the respondents will contend that the

(1) Sect. 34: "Where any person shall have resided for the term of three years in any parish, in such manner and under such circumstances in each of such years, as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein until he shall acquire a settlement in some other parish by a like residence or otherwise; provided that an order of removal in respect of a settlement acquired under this section shall not be made upon the evidence of the person to be removed, without such corroboration as the justices or Court think sufficient."

Sect. 35: "No person shall be deemed to have derived a settlement from any other person whether by parentage, estate, or otherwise, except in the case of a wife from her husband, and in the case of a child under the age of sixteen, which child shall take the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain the settlement so taken until it shall acquire another.

"An illegitimate child shall retain the settlement of its mother until such child acquires another settlement.

"If any child in this section mentioned shall not have acquired a settlement for itself, or being a female shall not have derived a settlement from her husband, and it cannot be shewn what settlement such child or female derived from the parent without inquiring into the derivative settlement of such parent, such child or female shall be deemed to be settled in the parish in which he or she was born."

Sect. 36: "The provisions relating to settlement shall not apply to any pauper removed under any order of removal, or without such order under the provision in that behalf contained in the Union Chargeability Act, 1865, before the passing of this Act, or in receipt of non-resident relief lawfully given, or in respect of whom any order of removal shall be pending at the passing of this Act."

(2) 2 Q. B. D. 269.

exception in s. 35 is also retrospective, and applies to children who were above sixteen at the passing of the Act. Such a construction would involve the reading in of several additional words, and the exception would run thus: "except in the case of a child under the age of sixteen, *or of a child who had while under the age of sixteen, and before the passing of the Act, acquired a derivative settlement from its father or its widowed mother,* which child shall take, *or shall be deemed to have taken,* the settlement of its father or of its widowed mother, as the case may be, up to that age, and shall retain, *or shall be deemed to have retained,* the settlement so taken until it shall acquire, *or shall have acquired,* another." There are no such retrospective words in the exception, which is purely future in its language. The object of sect. 35 was to prevent remote and expensive inquiries into derivative settlements, and it therefore limits the inquiry to children under sixteen years at the time of the passing of the Act, children of that age being already protected by 9 & 10 Vict. c. 66, s. 3, which prevented their being separated from their parents. Any other construction would make it very difficult to construe the 3rd paragraph of s. 35, and more words would have to be read in.

Lumley, for the respondents. The answer is twofold. First, the opening words of s. 35 are not retrospective. In construing statutes the Court always has a bias against destroying existing rights and liabilities. If the appellants' construction is right it will involve a great shifting of liabilities thoughout the country. There is nothing in the language of s. 35 more retrospective than in s. 34, which has been held not to be retrospective in *Reg.* v. *Guardians of Ipswich Union.* (1)

[HAWKINS, J. Then what "provisions relating to settlement" are retrospective, so as to give effect to the implication contained in s. 36?]

This Court is only bound by the decision in *Reg.* v. *Guardians of Ipswich Union* (1) so far as it is a decision directly upon the construction of s. 34, and is entitled to consider s. 35 independently of the correctness or otherwise of that decision. But, secondly, if the first clause of s. 35 is retrospective, then so must the exception

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be. The object of the section was to get rid of two difficulties which entailed great trouble and expense at sessions—one, that which arose when it was sought to go further back than a parent's birth settlement or that acquired by the parent himself, for instance, to a settlement derived by the father from the grandfather. The effect of the section is to abolish all derivation of settlements, except by the wife from her husband, and by the child from the parent of the settlement acquired by the parent for himself, or the parents' birth settlement, so as to avoid going back further than the parent; and, secondly, to fix the age of emancipation at sixteen. If the appellants are right, a child who at the time of the passing of the Act was sixteen and was living with his father will be separated from the father if both become chargeable, whereas a child who at that time of the passing of the Act was one day under sixteen would not. As to the language of the exception, it has been held that where a clause has a retrospective effect, words in an exception which have grammatically only a prospective meaning, may receive a retrospective interpretation, in order to make a reasonable construction: *Reg.* v. *Inhabitants of Christchurch.* (1)

Anstie, in reply.

Cur. adv. vult.

Feb. 4. The judgment of the Court (Cleasby, B., and Hawkins, J.) was delivered by

CLEASBY, B. The question in this case arises upon the 35th section of 39 & 40 Vict. c. 61. The pauper, as the law stood before the passing of that Act, had acquired a settlement in a parish in the Westbury Union derived from his father with whom he lived until he was upwards of seventeen years old. He had never acquired any settlement of his own.

It was contended on behalf of the appellants that the effect of the 35th section was to take away this derivative settlement; and the argument was, that the first part of the section destroyed the derivative settlement, and that the exception applied only to derivative settlements acquired after the passing of the Act.

To this two answers were given. One, that the 35th section was prospective altogether, and only applied to settlements gained

(1) 12 Q. B. 149; 18 L. J. (M.C.) 28.

after the passing of the Act; the other, that if the first part was retrospective the exception applied to settlements previously gained also. Upon the first question of the whole enactment of the 35th section being prospective, the case of *Reg.* v. *Guardians of Ipswich Union* (1) was referred to, in which the Queen's Bench Division had decided that the 34th section, which related to the same subject, viz., the subject of settlements, was not retrospective, acting upon the well-known rule that enactments which affect the future rights of parties are to be construed as applicable to future and not past transactions, unless there is a clear intention expressed that they shall also be applicable to past transactions.

We are not dealing with the 34th section but the 35th, and there is some difference in the language. Without questioning the decision upon the 34th section we are compelled to say that in construing the 35th we must give effect to the 36th. The 36th section enacts that the provisions as to settlement (including necessarily the 35th section) shall not take effect where there has been an order of removal, &c., which is as much as saying that they shall take effect and replace the old law in general, but not where the old law has been acted on. It would be giving no effect to the 36th section to hold otherwise, and we are not at liberty to reject a whole clause from an Act of Parliament which is obviously directed to a particular purpose.

The 35th section, then, being retrospective in its operation and applying to all derived settlements acquired before the passing of the Act or to be acquired afterwards, the question is, what effect is to be given to the exception. Unless there is something in the language strongly pointing to a contrary conclusion, we ought certainly to read the whole clause as either prospective or retrospective. An exception is something taken out of what has gone before, and if what has gone before was retrospective only it would almost follow that that which is excepted is the same. But in the present case the first part of the clause is no doubt prospective as well as retrospective, and it may therefore be argued that the exception applies to it only so far as it is prospective. And the language and subject-matter of the exception might, no doubt, be such as to make this a proper conclusion.

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But, without examining critically the language and grammar of the passage, we find nothing to justify us in saying that the enactment is to operate retrospectively, and the exception prospectively only. The effect of so holding would be, that a woman whose husband died the day before the coming into operation of the Act would lose her derivative settlement, and a woman whose husband died the day after would retain it, which cannot have been intended.

In reality the legislation is directed to remove difficulties of proof more than to introduce a law intrinsically better. This appears from the nature of the enactment, but more distinctly from the 3rd paragraph of the 35th section, and there is as much reason for applying such legislation to the past as to the future. If in order to prove the place of settlement of the pauper as derived from the father it had been necessary to prove a derivative settlement of the father, then by the direct enactment of the 3rd paragraph of the 35th section the pauper would be deemed to be settled in the parish where he was born. But it appears from paragraph 3 of the case that the father had acquired himself a settlement in the parish of East Dean in the appellant union. The son therefore had that settlement, and, having never acquired a settlement of his own, he retained it.

We have been referred since this judgment was written to a case in the Queen's Bench Division, *Parish of Great Yarmouth* v. *Clerk of the Peace of the City of London.* (1) There is a note of the case in the Weekly Notes of the 2nd of February. The question in that case arose upon the same section, the 35th, of the Act of Parliament. But the facts were different from those of the present case, and there is nothing in the judgment, so far as can be collected from the note, in any way inconsistent with our judgment.

The order of justices will therefore stand.

Judgment for the respondents, with costs. (2)

Solicitors for appellants: *Ingledew, Ince, & Greening, for M. F. Carter, Newnham.*

Solicitors for respondents: *Scott, Jarmain, & Trass, for Frank Taylor, Barrow-in-Furness.*

(1) To be reported. (2) Leave to appeal was refused.

3 Q B D 252.

BODY AND ANOTHER, APPELLANTS; JEFFERY, RESPONDENT. 1878 *Feb.* 4.

Turnpike Roads—Locomotives used on Highways—Locomotive Act, 1861 (24 & 25 *Vict.* c. 70), *s.* 3—*Wheels with Shoes.*

By the Locomotive Act, 1861 (24 & 25 Vict. c. 70), s. 3, every locomotive used on a highway and drawing any waggon shall have the tires of the wheels thereof not less than 9 inches in width, and the wheels shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width not less than 9 inches.

A locomotive was used on a highway, having the tires of the two driving-wheels 18 inches wide. Upon the tires were strips or shoes 9¾ inches in width, measured across the tire parallel to the axis of the wheel, and 3 inches broad and 1 inch thick. The shoes were placed alternately on each edge of the tire, and in the centre they touched and overlapped one another by about 1¼ inch. There was thus always a bearing surface of at least 9 inches in width on the road:—

Held, that no shoes or bearing surface would comply with the statute unless they were similar to the tires of the wheels prescribed, viz., uniform smooth-surfaced bands of the width of 9 inches at least round the whole circumference of the wheels; that these bands must be continuous and unbroken (save in so far as the joints of the material used might render perfect continuity impossible); and that the engine in question did not comply with the statute.

CASE stated by justices under 20 & 21 Vict. c. 43.

At a petty session at Rye, in the county of Sussex, on the 21st of November, 1877, the appellants were charged by information alleging that on the 25th of October previous, being the owners of a locomotive engine propelled by steam power, they used it on a highway, the wheels not being constructed in conformity with 24 & 25 Vict. c. 70, s. 3. (1)

(1) 24 & 25 Vict. c. 70, s. 3: Every locomotive propelled by steam or any other than animal power, not drawing any carriage, and not exceeding in weight three tons, shall have the tires of the wheels thereof not less than three inches in width, and for every ton or fractional part thereof additional weight the tires of the wheels thereof shall be increased one inch in width; and every locomotive drawing any waggon or carriage shall have the tires of the wheels thereof not less than nine inches in width; but no locomotive shall exceed seven feet in width or twelve tons in weight, except as hereinafter provided; and the wheels of every locomotive shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width not less than nine inches; and the owner or owners of any locomotive used contrary to the foregoing provisions shall for every such offence, on summary conviction, forfeit any sum not exceeding 5*l*. . . . ."

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At the hearing evidence was given by a constable and by a member of the firm of John Fowler & Co., manufacturers of the engine, and a drawing of a section of the wheel was put in, from which it appeared that the tires of the two driving-wheels were 18 inches wide. Upon the tires were strips or shoes $9\frac{3}{4}$ inches in width, from outside to inside, or in other words, measured across the tire parallel to the axis of the wheel. The shoes were 3 inches broad and 1 inch thick. They were placed alternately on each edge of the tire, and in the centre they touched and overlapped one another by about $1\frac{1}{4}$ inch. There was thus always a bearing surface of at least 9 inches in one continuous width on the road. In the opinion of the manufacturer if the shoes went straight across the wheel, leaving a space of 2 or 3 inches between each shoe, it would be of advantage to the engine on a soft road, but contrary to the Act.

It was thereupon contended for the appellants that s. 3 of 24 & 25 Vict. c. 70, had been strictly complied with, and that the wheels, although not smooth-soled, were used with a bearing surface of a width of not less than 9 inches, and that as the wheels rotated there was never less than a width of 9 inches of continuous bearing surface, because as soon as the bearing surface on one side of the wheel was exhausted it was immediately taken up by the bearing surface on the other side.

The justices were of opinion that the wheels were not constructed in accordance with the statute, and that the so-called shoes were not such as were contemplated by the Act, and were not a bearing surface with "one uniform uninterrupted line from side to side of the wheel," as laid down in *Stringer* v. *Sykes* (1), and therefore convicted.

The question for the Court was whether the determination was correct.

Jan. 29. *Sanderson Tennant*, for the appellants, contended that the wheels complied with the statute, having been made since and in view of *Stringer* v. *Sykes* (2), which decided that the 9 inches in width must be in one piece, and not made up of two; and that if the wheel was smooth-soled, or the shoes were smooth and con-

(1) 2 Ex. D. at p. 242. (2) 2 Ex. D. 240.

tinuous over the whole of the tire, the engine would not move on a hard, smooth road.

Lumley Smith, for the respondent, contended that to comply with s. 3 the shoes or other bearing surface must be (like the tires) continuous round the circumference of the wheel (for any other construction would permit cog-wheels, which would destroy the roads), and cited s. 4, which classes "shoes" with "fellies and tires."

Tennant replied.

Cur. adv. vult.

Feb. 4. The judgment of the Court (Cleasby, B., and Hawkins, J.) was delivered by

HAWKINS, J. We are of opinion that the determination of the justices was correct, and that this conviction ought to be affirmed. The sole question in the case is whether the driving-wheels of the locomotive used by the appellants upon a certain highway, rested upon such shoes or other bearings as are required by the 3rd section of the Locomotive Act, 1861. In considering this question we have derived considerable assistance from a reference to older legislation upon the same subject, to be found in the General Turnpike Acts, passed in the reigns of George III. and George IV.

By sect. 69 of the General Turnpike Act, 13 Geo. 3, c. 84, it is enacted that "the tire of the wheels of all waggons . . . . to be used upon any turnpike road shall be countersunk in placing the same upon the fellies in such manner that the nails shall not rise above the surface, and that the sole or surface of the wheels shall be quite flat." By the 2nd sect. of 16 Geo. 3, c. 39, after reciting the above provision, and that according to the strict sense of the words, that provision could not be complied with, it is enacted, "That all wheels of the breadth or gauge of 6 inches or upwards, the fellies or tire whereof shall not deviate more than 1 inch from a flat surface, shall be deemed and taken to be flat, according to the true intent and meaning of the said Act."

The 55 Geo. 3, c. 119, s. 1, authorized the trustees of roads to exempt from certain tolls such waggons, &c., as "shall have the soles or bottoms of the fellies of all the wheels thereof of the breadth of 6 inches, or of 9 inches, or of 16 inches or upwards,

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and be cylindrical, that is to say of the same diameter on the inside next the carriage as on the outside, so that when such wheels shall be rolling on a flat or level surface, the whole breadth thereof shall bear equally on such flat or level surface." (1)

The 2nd sect. of the General Turnpike Act, 4 Geo. 4, c. 95, enacts, "that the several nails of the tire or tires of the wheels of every waggon . . . . used or drawn on any turnpike road shall be so countersunk as not to project beyond one quarter of an inch above any part of the surface of such tire or tires."

Throughout these statutes will be found numerous provisions respecting the breadth or gauge of waggons, &c., using turnpike roads. When those Acts were passed, it is probable that no waggons or carriages of the weight and with the breadth of wheel of the modern locomotive, travelled upon an ordinary road.

In the year 1861, however, the use of locomotives being likely to become common on turnpike and other roads, it was deemed by the legislature necessary to make provisions for regulating the use of them, and accordingly by the 3rd sect. of 24 & 25 Vict. c. 70, the Locomotive Act, 1861, it is enacted that, "Every locomotive drawing any waggon or carriage shall have the tires of the wheels thereof not less than 9 inches in width . . . . and the wheels of every locomotive shall be cylindrical and smooth-soled, or used with shoes or other bearing surface of a width not less than 9 inches;" and it goes on to subject the owner of any locomotive, used contrary to the foregoing provisions, to a penalty not exceeding 5*l*.

It is clear to us that the object of the legislature in passing this enactment was to protect, as far as possible, the surface of roads travelled over by locomotives, by insisting upon the wheels thereof being cylindrical within the meaning of the older enactments; and upon the tires of the wheels being smooth-soled and of a minimum breadth or gauge of 9 inches, so that to use the language of the statute 55 Geo. 3, c. 119, "when such wheels shall be rolling on a flat or level surface the whole breadth thereof shall bear equally on such flat or level surface." The use of shoes or other bearing surface is not mentioned in any of the earlier statutes; and we have

(1) Sect. 69 of 13 Geo. 3, c. 84, is repealed by s. 1 of 16 Geo. 3, c. 39. The statutes 16 Geo. 3, c. 39, and 55 Geo. 3, c. 119, are repealed by s. 1 of 3 Geo. 4, c. 126.

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no doubt that the proviso respecting them was introduced into the Act we are now called upon to construe in ease and favour of the owners of locomotives, by not insisting upon the wheels themselves being smooth-soled (which might be very inconvenient in their general use), nor upon the wheels themselves coming in contact with the surface of the road travelled over; provided they are used either with shoes, by which we understand a smooth-surfaced shoe, covering the whole surface of the tire, or, at the option of the owners, some other bearing surface of the minimum breadth of 9 inches, which shall in substance, represent a smooth-soled wheel of that width; so that when travelling along the road the substituted bearing surface as it comes in contact with the surface of the road shall produce the same even, uniform, and continuous pressure which a wheel of the same dimensions and character would produce.

In other words, we think that the legislature in permitting the use of shoes or other bearing surface, did not intend to confer upon the owners the privilege of using any but those which would produce upon the road travelled on the same pressure and effect as the wheels they had prescribed, in the event of their being used without shoes or other bearing surface. We do not think the bearing surfaces used by the appellants upon the occasion in question were such as the statute intended to allow as a substitute for smooth-soled wheels, nor do we think they would produce the same or similar pressure or effect upon the road travelled over.

In *Stringer* v. *Sykes* (1) this Court decided that the bearing surface must be of a continuous breadth of 9 inches across the wheel, and that a bearing surface of a width of 9 inches made up of two flat bars, each of the breadth of 4½ inches, but with a break between them of 3 inches, bolted obliquely across the whole width of the wheel was not sufficient to satisfy the statute, but that the statute required one uniform uninterrupted line of 9 inches from side to side of the wheel; that is, that there should be one uninterrupted pressure of 9 inches measured across the wheel. We entirely abide by that decision; and we go further, and hold that such uninterrupted pressure must be continuous throughout the whole circumference of the wheel, save in

1) 2 Ex. D. 240.

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so far as the joints of the material used may render perfect continuity impossible. For we do not intend to say that the bearing surface should, throughout the whole circumference, consist of one piece of material only; and we think that no shoes or bearing surfaces will be sufficient to satisfy the requirements of the statute unless they are similar to the tires of such wheels as the statute has prescribed, viz., uniform, continuous, unbroken (save as aforesaid), smooth-surfaced bands of the width of 9 inches at least round the whole circumference of the wheels. It is not necessary for us to pronounce any opinion as to the degree of smoothness required in the surface of the wheels, shoes, or bearing surface, nor do we intend to do so; but we may observe, that although in the early part of the reign of George III. it was enacted that so long as the fellies or tires did not deviate more than one inch from a flat surface, the wheels should be deemed to be flat according to the meaning of the Act, a deviation of a quarter of an inch only was allowed by the statute 4 Geo. 4, c. 95, and it may well be that even that deviation would not be permitted, if the question should hereafter arise whether the wheels of a locomotive are smooth-soled within the meaning of the Locomotive Act, 1861.

Our opinion being that the conviction was right, this appeal will be dismissed with costs.

Conviction affirmed.

Solicitors for appellants: *Langham & Sons, for Langham, Hastings.*

Solicitors for respondent: *Kingsford & Co., for Dawes, Rye.*

YOUNG, APPELLANT; COOK, RESPONDENT. 1877

Nov. 23.

Inland Revenue—Licence to deal in Gold Plate—Article composed wholly or in part of Gold—30 & 31 Vict. c. 90, ss. 1, 3, 5.

The term "gold," as used in 30 & 31 Vict. c. 90, which imposes a duty on licences to trade in gold or silver plate, does not mean pure gold, but a mixture of pure gold and alloy: so that a goldsmith, holding a licence on the lower scale, is liable to a penalty if he sells an article as gold which weighs more than two ounces, though it does not contain two ounces of pure gold.

CASE stated by a metropolitan police magistrate, under 20 & 21 Vict. c. 43, on an information by the appellant against the respondent under 30 & 31 Vict. c. 90, s. 3 (1), for dealing in plate without a proper licence.

(1) By statute 30 & 31 Vict. c. 90, s. 1: 'In lieu of the duties now payable in Great Britain on licences to persons trading in, vending, or selling gold or silver plate, and in Ireland on licences to persons to sell or make gold or silver plate, there shall from and after the 5th of July, 1867, be charged and paid the following excise duties on licences to deal in plate to be taken out yearly in the United Kingdom, by the persons hereinafter mentioned (that is to say)—

"By every person who shall trade in or sell any article composed wholly or in part of gold or silver, in respect of every house, shop, or other place in which his trade or business shall be carried on—

"Where the gold shall be above two pennyweights and under two ounces in weight, or the silver above five pennyweights, and under thirty ounces in weight, the sum of two pounds six shillings;

"Where the gold shall be of the weight of two ounces or upwards, or the silver of the weight of thirty ounces or upwards, the sum of five pounds fifteen shillings."

By sect. 3: "Every person who shall do any act, or carry on any trade or business for which a licence to deal in plate is required by this Act, without having in force a proper licence authorizing him so to do, shall for every offence forfeit the sum of fifty pounds; and in any proceeding for the recovery of such penalty it shall be sufficient to allege that the defendant did deal in plate without a proper licence in that behalf, and it shall not be necessary further or otherwise to describe the offence."

By s. 5: "All articles sold or offered for sale, or taken in pawn, or delivered out of pawn, and alleged to be composed wholly or in part of gold or silver, shall for the purposes of this Act, be deemed and taken to be composed of gold and silver respectively as alleged; and if upon the hearing of any information for any offence against this Act any question shall arise touching the quantity of gold or silver contained in any article, the proof of such quantity shall lie upon the defendant."

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The following facts were proved or admitted. The appellant an officer of excise, went to the shop of the respondent, who carried on business as a jeweller, and bought a guard chain which was offered for sale and sold as a gold chain, and weighed 2 ozs. 11 dwts. 10 grs.

The respondent had in force a licence to deal in plate, taken out by him under 30 & 31 Vict. c. 90, in respect of his shop, for which he paid the sum of 2*l.* 6*s.* The amount of pure gold contained in the chain was less than two ounces. On the part of the appellant it was contended that, inasmuch as the chain in question, as offered for sale and sold, was alleged to be a gold chain, it must under the provisions of 30 & 31 Vict. c. 90, s. 5, be taken to be composed of gold as alleged; that no question could arise under that section touching the quantity of gold contained in an article alleged to be gold; and that as the weight of the gold chain was proved to be two ounces or upwards, the sale thereof was not authorized by the licence granted to the respondent at the lower rate of duty; and that the respondent not having in force a licence at the higher rate of duty had incurred the penalty of 50*l.* named in the 3rd section of the Act.

On the part of the respondent it was contended that as the article in question contained less than two ounces of gold, he was properly licensed under the Act, and that he had not incurred the penalty mentioned therein.

The magistrate dismissed the information. The question for the opinion of the Court was whether the actual weight of the articles, or the weight of the pure gold contained therein, is to be taken as the proper test for assessing the licence duty.

C. Bowen, for the appellant. The standard of gold has been altered at various times, and now in pursuance of 17 & 18 Vict. c. 96, there are five proportions of gold and alloy which may be used. The last statute, 30 & 31 Vict. c. 90, in view of this variety, and the consequent difficulty of determining the amount of pure gold, treats any of these mixtures of gold and alloy as "gold," that is, as what is commercially known as gold. The 1st section, which speaks of articles composed wholly or in part of gold, should be read as referring to articles either wholly of gold of any lawful

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standard, or to articles partly of such gold and partly of some substance (other than alloy) in respect of which a licence is not necessary, and the same meaning must be attached to the word "gold" in the 5th section. The respondent has therefore sold an article alleged to be composed wholly of gold, and no question can arise touching the quantity under the latter part of the section, which is only applicable to articles partly of gold and partly of some other material.

Anstie, for the respondent. The tradesman is entitled to shew that the actual quantity of gold in the article sold by him did not exceed the amount covered by his licence, by shewing the extent to which it was alloyed. This is a necessary implication from 30 & 31 Vict. c. 90, s. 1, and the words of the latter part of s. 5, taken in their most obvious and natural sense; and the history of the legislation on the subject shews that it was so intended.

The standard of gold was raised in the reign of Elizabeth (1576) by royal proclamation to 22-carats; and the same standard was afterwards fixed by the Act of 12 Geo. 2, c. 26. This is still the standard of fine gold and of the coin; but by 38 Geo. 3, c. 39, a second standard of 18-carats was permitted. From the time when the duties on the manufacture (6 Geo. 1, c. 11) and afterwards on the sale of plate (31 Geo. 2, c. 32) were first imposed, until after the introduction of the double standard, no provision relating to the proof of the weight of gold in articles sold is to be found in the Acts which created and from time to time varied those duties, although ever since 32 Geo. 2, c. 24, the amount of licence has varied with the weight of the articles sold under it. But after the admission of the double standard the question now raised appears to have arisen, and was met by 59 Geo. 3, c. 32, s. 3, which enacted that any article sold as gold should be deemed to be gold; and this enactment was repeated in 6 Geo. 4, c. 118, s. 3. The difference between the two standards was not considerable; but by 17 & 18 Vict. c. 96, s. 1, other standards were admitted, going so low as one-third gold and two-thirds alloy; and in pursuance of that statute standards of 22, 18, 15, 12, and 9-carats are now in use, and articles of the various standards are distinguished by appropriate hall-marks. The quantity of pure metal therefore

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in articles of the same weight described as "gold," now varies greatly. Accordingly, 30 & 31 Vict. c. 90 by Sched. A. repeals 59 Geo. 3, c. 32, s. 3, and 6 Geo. 4, c. 118, s. 3, and in s. 5 substitutes for the repealed sections provisions which raise only a primâ facie presumption against the seller that the article sold is of fine gold, but enable him to prove the real quality by means of the impressed hall-mark.

C. Bowen, in reply.

KELLY, C.B. In this case I think that the respondent was subject to the higher duty, and has rendered himself liable to a penalty.

The facts of the case appear to be simply these, that the respondent is a goldsmith and jeweller, and he dealt, amongst other articles, in gold chains. On the day in question, the appellant went into the shop and asked for a gold chain, and a chain was produced by the respondent and described as a gold chain in what passed between the parties, and the price of the chain being paid, it was accordingly delivered over to the purchaser as a gold chain. It appears that the weight of that gold chain, or in other words the quantity of gold, according to the construction which I am disposed to put on the 5th section of the Act of Parliament, was upwards of two ounces. If the respondent deals in an article of gold exceeding in weight two ounces he is liable to the higher duty, and the question is whether, as it appears that the chain, if analysed, would be found to contain much less of pure gold than two ounces, that entitles the respondent to carry on his business as a goldsmith and jeweller under the lower licence, which applies only to the dealing in gold articles where the gold is less in quantity than two ounces. The question arises on the 1st and 5th sections of the Act. It appears to me the word "alleged," in the 5th section, is an unfortunate word, and tends, upon the first view of the language of this clause, to mislead; because there is, strictly speaking, no allegation; but it must be taken to mean what would have been more properly expressed by the word "described." Taking the first part of the 5th section by itself, it would appear that this chain was described by the seller, the respondent, to be a gold chain, and so must be taken to have been composed of gold,

and if composed of gold, as there was more than two ounces in it, he is liable to the higher licence.

But the 5th section continues: "If, on the hearing of any information for any offence against this Act, any question shall arise touching the quantity of gold or silver contained in any article, the proof of such quantity shall lie upon the defendant;" and with reference to what is contained in the first section of the Act of Parliament, it is said that must mean the quantity of pure gold, and so the case would come within that provision, since a question did arise in this case whether the quantity of pure gold contained in the chain was not less than the weight of two ounces. Reference is made to the first section to support this view, and it is said that the meaning of the expression, "every person who shall trade in or sell any article composed wholly or in part of gold" (leaving out altogether anything about silver), is "every person who shall trade in or sell something wholly of pure gold or in part of pure gold and of alloy." But that is not so. The meaning is quite obvious; every article of commerce which is sold in a goldsmith's or jeweller's shop, whether it is represented and sold as gold or represented and sold as silver, is known to be composed in part only of pure gold or pure silver. Thus the meaning is not that the use of the word "gold" in any part of the Act, or the use of the word "silver" in any part of the Act, means pure gold or pure silver, but merely what is ordinarily called gold or silver. This is quite consistent with the 5th section, for the question that may arise on the hearing of an information is not as to what is pure gold or pure silver in any article sold, but what is the quantity of what in common parlance is called gold or silver used in the construction of the article; so that in the case before us no question arises under the latter part of the 5th section. I do not see how any question can arise under this Act as to how much of pure gold there is in an article, or how much of pure silver. The question that may arise is merely what is the weight of gold in an article which is sold, or what is the weight of silver in an article which is sold, and accordingly whatever appears to be, in common parlance, gold or silver, subjects the vendor to the lower duty or the higher, according to its weight.

Under these circumstances, I think the respondent was liable

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to the higher amount of duty, and the case will be remitted with our opinion.

CLEASBY, B. I am myself clearly of the same opinion. This act relates to persons carrying on trade in gold and silver plate, who are liable to duties, and has to do with the matter of granting licences to such persons, and has no relation to refiners who are engaged in procuring pure gold from the ore, and to persons of that description.

Now the first section after the enacting part of it provides for the case of persons dealing in gold plate, which includes articles composed wholly or in part of gold, and the duty is 5*l.* 15*s.* if the gold is over the weight of two ounces. Now what is the meaning of the word "gold of the weight of two ounces," which imposes the necessity of paying the higher duty. I think it undoubtedly signifies taken by itself, not pure gold which is commercially unknown, but gold with whatever alloy there is in 22, 18, 15, or 9-carat gold, or whatever it might be. But the 5th section is introduced for the purpose of removing the difficulties of proof that might exist as to an article which was of gold wholly or in part. If you describe an article as wholly or in part consisting of gold, it is to be taken to be gold for the purposes of this Act as alleged. "For the purposes of this Act" means for the purpose of ascertaining what should be the proper duty payable by the person for his licence. No doubt, therefore, it is a duty payable on an article sold as gold, imposed upon persons dealing in that article where there is more than two ounces. There the case is complete. Now that was not disputed by the learned counsel, and he could not dispute it if you read the Act of Parliament only up to the middle of the 5th section, but he says the necessary effect of the subsequent part of the 5th section is to give a different meaning, and to shew that in estimating the quantity of gold for the purposes of this Act, which is dealing entirely with a commercial matter, you must take the quantity of pure gold, difficult as it is to get at it. Nothing could be more inconvenient, indeed it might be next to impossible, unless by pulling to pieces each piece of work about which there was a question. Still those words cannot be eliminated from the Act of

Parliament, and if no effect can be given to them except by reading, in that particular clause, the word gold to mean pure gold it must be so read. But there is really no necessity for that whatever; articles sold as wholly or in part consisting of gold shall be taken to be gold as alleged. If a man sells an article composed partly of gold and partly of silver, for instance, a silver racing cup with a gold horse attached, and there is a duty payable in respect of the gold, when you come to consider whether there are two ounces of gold or not, how is that to be ascertained? The revenue authorities say there are more than two ounces of gold in this horse at the top, and the seller says there are less. If there are more he must pay the higher duty, if less the lower. You cannot break the thing to pieces and weigh the particular parts, therefore it is provided that you who sell, who have the means (if you had bought it from the manufacturer you would not perhaps have the means, but generally speaking you have the means) of proving the amount of gold there is, shall have the burden of proof upon you. That seems to me to be pretty clearly the sort of case to which that part of the section applies, and I do not find any difficulty, such as the learned counsel insisted upon, in that part of the section.

Case remitted with the opinion of the Court in favour of the appellant.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for respondent: *Layton & Jaques.*

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Dec. 6.

THE CHARTERED MERCANTILE BANK OF INDIA, LONDON, AND CHINA *v.* WILSON.

*Revenue—Inhabited House Duty—*14 *&* 15 *Vict. c.* 36, *s.* 1—*Building occupied for purposes of Trade only—Telegraph Company—*57 *Geo.* 3, *c.* 25, *s.* 1—5 *Geo.* 4, *c.* 44, *s.* 4—32 *&* 33 *Vict. c.* 14, *s.* 11.

A banking company carried on their business on a part of their premises, and let off the remainder to a telegraph company, with the exception of two rooms occupied by a caretaker, who looked after the whole premises. The banking company having been assessed to the inhabited house duty in respect of the whole building:—

Held (by Kelly, C.B., and Pollock, B.), that the business of a telegraph company is a trade within the meaning of 57 Geo. 3, c. 25, s. 1, and that as the whole of the premises were occupied for purposes of trade only they were exempt under 32 & 33 Vict. c. 14, s. 11:

Held, contrà, by Cleasby, B., that the provisions of 32 & 33 Vict. c. 14, s. 11, apply only to premises occupied for the purposes of trade within 57 Geo. 3, c. 25, s. 1, and not to premises used as offices or counting-houses for any profession, vocation, business, or calling within 5 Geo. 4, c. 44, s. 4; that the business of a telegraph company was not a trade within the meaning of the former Act, and that the premises were not exempt. (1)

CASE stated under 37 Vict. c. 16, s. 9, by commissioners for executing the Acts relating to inhabited house duties, on appeal against an assessment to the inhabited house duties for the year

(1) 57 Geo. 3. c. 25, s. 1, after reciting that duties on inhabited houses were granted by 48 Geo. 3, c. 55, sch. B., enacts: "And whereas it is become usual in cities and large towns and other places for one and the same person, or for each person where two or more persons are in partnership, to occupy a dwelling-house or dwelling-houses for their residence, and at the same time one or more separate and distinct tenements or buildings, or parts of tenements or buildings, for the purposes of trade, or as warehouses for lodging goods, wares, or merchandise therein, or as shops or counting-houses, and to abide therein in the daytime, only for the purposes of such trades respectively, which have been charged with the said recited duties, although no person shall inhabit or dwell therein in the night-time; and it is expedient in such cases to exempt from the said duties such tenements or buildings, or parts of tenements or buildings, as are or shall be solely employed for the purposes herein mentioned, be it therefore enacted . . . . that from and after the 5th day of April, 1817, on due proof made in the manner herein directed to the satisfaction of the respective commissioners acting in the execution of the said recited Act, that any person or any number of persons in partnership together respectively occupy a tenement or building, or part of a tenement or building, which shall have previously been occupied for the purpose of residence wholly, as a house for the pur-

ending the 5th of April, 1874, of 5500*l.*, being the full value of the appellants' premises.

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pose of trade only, or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, no person inhabiting, dwelling, or abiding therein, except in the day-time only, for the purpose of such trade, such person, or each of such persons in partnership respectively, residing in a separate and distinct dwelling-house, or part of a dwelling-house, charged to the duties under the said Act, it shall be lawful for the said commissioners, according to the provisions of this Act, to discharge the assessment made for that year in respect of such tenement or building which shall be so used for the purposes of trade, or so employed as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, anything in the said Act to the contrary notwithstanding."

5 Geo. 4, c. 44, s. 4, enacts: "And whereas by an Act passed in the 57th year of his late Majesty's reign provision is made for the granting exemptions to persons in trade from the duties on houses, windows, and lights, and on inhabited houses, in respect of houses, tenements, or buildings, or parts of tenements or buildings, used solely by such persons for the purposes of trade, such persons respectively residing in a separate and distinct dwelling-house, or part of a dwelling-house, charged to the said duties as in the said Act described: And whereas it is expedient to extend the said exemptions to the case herein mentioned, Be it further enacted that upon all assessments to be made for any year commencing from and after the fifth day of April, 1824, the provisions in the said Act contained for granting exemptions from the said duties to persons in trade in respect of houses, tenements, or buildings in the said Act described, shall and may be extended and applied by the respective commissioners and officers acting in the execution of the said Act and of this Act on due proof, to all and every person, or any number of persons in partnership together, for and in respect of any house, tenement, or building, or part of a tenement or building, in the said Act described, which shall be used by such person or persons as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, business, or calling by which such person or persons shall seek a livelihood or profit, no person inhabiting, dwelling, or abiding therein, except in the day-time only, for the purpose of such profession, vocation, business, or calling, such person or each of such persons in partnership respectively residing in a distinct and separate dwelling-house, or part of the dwelling-house, charged to the said duties; provided, nevertheless, that the exemption herein authorized shall not extend to any chamber or apartment in any of the Inns of Court or of Chancery, or to any college or hall in either of the universities of Oxford or Cambridge, now chargeable with any of the said duties; and the said exemptions hereby authorized shall be claimed and allowed on due proof, and the assessments thereupon discharged, by the same rules and in like manner and form as are allowed by by the said Act to persons in trade...."

32 & 33 Vict. c. 14, s. 11, enacts that "from and after the 5th day of April, 1869, any tenement or part of a tenement occupied as a house for the purposes of trade only, or as a ware-

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The premises, Nos. 65 and 66, Old Broad Street, consist of basement and ground floor, and of upper floors, running over a portion of the premises. There are two separate main entrances from the street, one in Old Broad Street and the other in Austin-friars. The entrance to the portion of the premises known as No. 66 is in Austin-friars. There is a lobby on the ground floor, containing a staircase leading to the first and upper floors, and a staircase leading to the basement. The premises No. 66, comprise the basement under this lobby, the lobby itself, and the whole of the first and upper floors. The entrance to No. 65 is in Old Broad Street, and the premises consist of the remainder of the ground floor and basement. The basements of Nos. 65 and 66 are completely separated by brick walls, and approached by separate staircases.

The premises No. 65 are in the occupation of the appellants and used by them as a bank, and for the purpose of carrying on their business as bankers.

The premises No. 66 (with the exception of two rooms on the third floor, occupied by a caretaker employed by the appellants, who resides there with his wife for the protection of the entire premises), are let to the Eastern Telegraph Company, Limited, and are occupied by them solely for the purpose of carrying on their business. The whole of the orders for the management of the business of the company are issued from these premises, and all the accounts between the company and their customers, and between the company and their own shareholders, are kept on such premises.

With the exception of the caretaker and his wife, no person sleeps on any portion of the premises No. 65 or No. 66.

The entrance to No. 65 from Old Broad Street, opens into a lobby, through which is the access to the appellants' bank premises. The only internal communication between No. 65 and 66 is through this lobby.

The regular entrance to the premises of the telegraph company

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house for the sole purpose of lodging goods, wares, or merchandise therein, or as a shop or counting-house, or being used as a shop or counting-house, shall be exempt from inhabited house duties, although a servant or other person may dwell in such tenement or part of a tenement for the protection thereof."

is by the door from Austin-friars, but during banking hours some iron doors between the lobby to No. 65 and that to No. 66 are allowed by the appellants to be open, so as to give the Eastern Telegraph Company access to their premises from Old Broad Street, which is to some persons more convenient than the entrance from Austin-friars. At the close of the bank business of the day, these iron doors are, with the entrance to No. 65, from Old Broad Street, closed and locked by the bank porter, who keeps the keys of both doors, and when this is done the bank premises are completely shut off from the rest of the building, and the only approach to the premises No. 66 is from Austin-friars.

In the valuation list made for the city under the Valuation (Metropolis) Act, 1869, in the year 1870, the premises were valued as one building, and were thenceforth, until 1875, rated to the poor as one building; but upon the appeal of the appellants against the new valuation list made in the year 1875, the assessment has been divided, and Nos. 65 and 66 are now separately assessed and rated to the poor.

The appellants contend, first, that no part of the premises form an inhabited dwelling-house within the meaning of 14 & 15 Vict. c. 36, s. 2, and that, even if they do, they would still be exempt under the provisions of 32 & 33 Vict. c. 14, s. 11, inasmuch as they are used for the purposes of trade only.

Secondly, that the bank premises are occupied for the purpose of trade only, and that they are so structurally severed from the rest of the building as to be a different tenement for rating purposes; and that, even if the premises in the occupation of the telegraph company are not exempt, and are not occupied as trade premises within the meaning of this statute, yet the assessment is wrong, inasmuch as the whole of the premises are rated therein.

Thirdly, that whether this is so or not the assessment was bad, as being to the full value, although a part of the premises were in the occupation of the appellants for purposes of trade only.

The commissioners confirmed the assessment, and the question for the opinion of the Court was whether the commissioners were right in so doing.

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F. M. White, Q.C., for the appellants. The first question is whether this building is one house or two. If the building consists of two distinct houses, as the appellants allege, the assessment is wrong on the ground that the appellants are assessed for the whole. The case differs from that of *Attorney-General* v. *Mutual Tontine Chambers Association* (1), for here there are two separate basements and two separate street entrances. The only circumstance which seems to make against this contention is, that there is a means of communication between the two houses which is not always shut, but this alone does not alter the whole character of the building. Further, whether the building is one or two houses, the telegraph company occupy for purposes of trade only, and as the whole of the premises are so occupied, the presence of a caretaker does not affect the exemption given by 32 & 33 Vict. c. 14, s. 11. The telegraph company is a commercial undertaking, and as much a trading partnership as a banking company. They certainly are as much traders as carriers who are included in the Bankruptcy Acts. The expression "trading" is not necessarily confined to mere buying and selling goods and merchandise.

Sir Hardinge S. Giffard, S.G. (*Dicey* with him), for the Crown, was directed to confine his argument to the question whether the telegraph company are traders. Trade involves of necessity the idea of buying and selling, and the expression "trade" is something different from "business," "vocation," or "employment." It cannot now be disputed that London bankers are traders, but one portion of their business is to buy and sell bills. Carriers are only made traders by Acts of the present reign for purposes of bankruptcy, independently of any consideration whether they ought otherwise to be so described. "Buying only or selling only did not at common law qualify a man to be a bankrupt, but it must be both buying and selling, and also getting a livelihood by it. . . . Also an innkeeper cannot as such be a bankrupt, for his gain or livelihood does not arise from buying and selling in the way of merchandise": Blackstone, Commentaries, vol. ii. p. 476. A dyer is not a trader, though modern Bankruptcy Acts make him liable as such. In *Edinburgh Life Assurance Co.* v. *Solicitor*

(1) 1 Ex. D. 469.

of Inland Revenue (1), it was held by the Court of Session that a life assurance company are not traders.

F. M. White, Q.C., was not heard in reply.

KELLY, C.B. In the present state of the argument we think we are justified in at once pronouncing our judgment. With regard to the question which has been argued for the appellants, but not on behalf of the Crown, I might, independently of the authorities, be disposed to entertain some doubts whether this was really to be deemed one tenement; but my learned brethren are decidedly of opinion that it is to be deemed one tenement, and, looking to the authorities, I do not feel disposed to differ, and therefore, upon that point, the judgment of the Court is in favour of the Crown.

With regard to the question whether this tenement, which is in the occupation of the telegraph company, is to be deemed to be a house occupied for the purpose of trade only, I am clearly of opinion that it is. The main ground upon which I found that opinion is that we are bound to put a large and liberal construction upon any provisions in any Act of Parliament, where the construction proposed to be put upon it is in favour of the trade and commerce of the country. Undoubtedly, if we are to take the terms "for the purposes of trade" as relating only to the business of buying and selling, no one can say that there is any buying or selling in carrying on the business of a telegraph company. It was never the intention of the legislature so to limit the meaning of the word "trade." It is not only the literal meaning of the word which is to be regarded. In literature of all descriptions, both in prose and verse, we find that the word "trade" is often used in a much more extensive signification than to indicate merely the operation or occupation of buying and selling. Why are we so to limit it in a case of this nature? I cannot feel any doubt but that really the object of the legislature was to protect the commercial business of the country. Whatever might be the precise nature of the occupation, if it was one which was practised for the commercial benefit of the country, it was

(1) 12 Scot. Law Rep. 275; and Cases in the Court of Session, 4th Series, vol. ii. p. 394.

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intended to exempt those operations from the liability to this tax. We find the expression does not stand alone, but that the section also says "part of a tenement occupied as a house for the purposes of trade only." That is the first exemption. Then comes this, "or as a warehouse for the sole purpose of lodging goods, wares, or merchandise therein." Now I apprehend that throughout a very great portion of the commerce of the country, not only in the city of London and in the metropolis, but in all the great commercial towns of this country, a warehouse is the scene of larger and more numerous commercial operations than any other description of building. There may well be warehouses where there is nothing like buying and selling, but where goods are deposited, and there may be persons who may be traders in other respects, and who likewise carry on that business independently of their own particular trade, and when we find the example given in the next provision, "a warehouse for the sole purpose of lodging goods, wares, and merchandise therein," and where there is, therefore, nothing like buying and selling referred to or at all pointed at, I think we may apply the maxim "Noscitur a sociis," and apply the earlier provision about a house used "for the purposes of trade only" in the same way as the provision which next follows, namely, the provision respecting warehouses, where there is nothing like buying and selling carried on, and which has been adopted and given as an example by the legislature. We then come again to the shop or counting-house. Now a shop undoubtedly is a place in general in which nothing is carried on but buying and selling. I say "in general," because it is not always so. I have heard the expression repeatedly, and we find it in books, and must often have heard it in conversation, that a banker's is a "shop," the "banking shop of a bank," and there, again, there is nothing like buying and selling as generally understood, but it is a trade or business of a description quite sui generis, and certainly quite apart from what is generally understood by buying and selling. But a counting-house is a building or apartment in which every description of commercial business is carried on; a tradesman doing any large amount of business has, independently of his shop, a counting-house in which the counting-house business of the concern is carried on, merchants have it who

live by buying and selling, and, in fact, almost every man of business has something like a counting-house in which he carries on his business or a portion of his business.

I think, therefore, applying the maxim "noscitur a sociis," we may reasonably infer that the legislature never intended by the use of this word "trade" to limit the business which is to exempt the occupier of the tenement from the tax in question to mere buying and selling. We may reasonably say that it was intended to embrace a great variety of different operations, though all of a commercial character, something therefore like a warehouse, like a shop, like a counting-house, all which expressions are to be construed, in my opinion, upon the same principle, namely, by putting a large and liberal interpretation upon the exemption which the legislature has provided for persons, whatever may be the precise occupation or vocation which they follow, who carry on, or assist in carrying on, the commercial business of the country. I have only a word to say about the Scotch case which has been cited. I receive with great attention every decision we hear of in the Court of Session in Scotland, but when we consider that the judgment of the learned judges in that case related to a life assurance company, I cannot think the authority in question has any bearing upon the present case. The difference is substantial in every way; a life assurance company in one sense may be said to be a commercial undertaking, but on the other hand, it is one of a very peculiar character, and indeed of a very limited character; it is an agreement or contract which is made between one man and another, or between an individual and the company, that in consideration of an annual payment during his life the executors of the one party shall at his death become entitled to a particular sum of money. I do not know that there is anything of a commercial nature in a transaction of that kind. It is quite different from the business of a telegraph company. I content myself, therefore, with saying that, in my opinion, the difference is so manifest, both in principle as well as in fact, in the nature of the operations in question between those of a telegraph company and those of a life assurance company that I do not consider the case in Scotland at all applicable to the case which is now before the Court. Under those circumstances

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it appears to me that the appellant is entitled to the judgment of the Court.

CLEASBY, B. I confess I think that judgment ought to be given for the Crown, although I deemed it quite unnecessary to have any further argument, because we are all agreed upon the question which the learned Solicitor-General has not dealt with. As to that question, I do not entertain any doubt that these premises are to be regarded, for the purpose of applying the law of inhabited house taxation, as an inhabited house. It is a question of considerable difficulty when looked at by itself, but it has really been considered and decided already. The question of a part of a tenement was particularly considered in *Rusby* v. *Newson* (1), and I endeavoured to point out in that case, although I am afraid I did not do so as clearly as I might have done, at all events it does not appear so on reading the report, that 57 Geo. 3, c. 25, and 32 & 33 Vict. c. 14, when they speak of a part of a tenement, refer to part of a tenement which might have been taxed as an inhabited house. That is the only explanation, in my opinion, of the term "part of a tenement;" we must read it with the recital of 57 Geo. 3, c. 25, from which it appears that it must be part of a tenement which was the subject of taxation as an inhabited house. Now in this case the great feature is that there is a common entrance during the day. The tenant has a right to go through the entrance of the bank to his premises during the day, and he has a right to put his plate upon the door of the bank, giving a character of unity as it were to the whole; but still more, there is one person living in one part, that is, the telegraph part, who has the care of the whole. Those circumstances give to this tenement the character of one house, and in a way which certainly has not occurred in any case which has been decided.

Now we come to the next part of the case, and after what I have heard from my Lord, I cannot say that I come to the same conclusion. I quite agree that the Scotch decision is not upon the same facts as the present case, because I can see a considerable distinction between an insurance society and a telegraph

(1) Law Rep. 10 Ex. 322.

company, but it appears to me that the principles laid down in that case are quite correct, and that if they are applied to the present case we should come to the conclusion that the telegraph company does not come within the exemption of the section. It is necessary, however, to go back to the history of the legislation upon the subject in order to see how I arrive at this conclusion, because it is to a certain extent a system of legislation, and one part of it should not be taken alone without regard to the next. I will begin taking the Solicitor-General's suggestion that every house that is occupied is an inhabited house; then there is an exemption made by 57 Geo. 3, c. 25, and the importance of referring to this arises from the fact that the language there used is the same as the language of 32 & 33 Vict. c. 14. This enactment having been made and acted upon was felt to be a grievance to a certain class of persons who did not occupy premises for the purposes of trade, but who occupied premises for the purpose of some employment by which they gained their livelihood. This led to the enactment of 5 Geo. 4, c. 44, s. 4, which extends the provisions contained in the Act of Geo. 3, for granting exemptions from the duties to persons in trade, to "all and every person, or any number of persons in partnership together, for and in respect of any house, tenement, or building, or part of a tenement or building in the said Act described, which shall be used by such person or persons as offices or counting-houses for the purposes of exercising or carrying on any profession, vocation, business, or calling by which such person or persons shall seek a livelihood or profit." There is, therefore, in reference to this particular subject of taxation a clear distinction drawn between premises occupied for the purposes of trade, or as warehouses, or counting-houses, or shops, and premises which are occupied as offices or counting-houses for the purposes of carrying on any business of profit. That is the way in which the law stood until we come to the Act of 32 & 33 Vict. c. 14. The prior Act did not allow any person to sleep on the premises at all; they must be upon the premises by day only. When the enactment took place which we are now considering, whether intentionally or unintentionally it is not for me to say, the enactment is made to apply only to those premises mentioned in 57 Geo. 3, c. 25, and it is not made to apply to those

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matters enumerated in 5 Geo. 4, c. 44, exempting persons who use offices or counting-houses for the purpose of carrying on any business whereby they obtain a livelihood. The language of the section which I am now considering is precisely the same as the language of 57 Geo. 3, c. 25, with the exception of the addition at the end, which I do not think can have any bearing upon the present question, "or being used as a shop or counting-house," in addition to the words, "occupied as a shop or counting-house." It was upon this difference that the Scotch case proceeded, seeing that the legislature had drawn a distinction between premises used for the purposes of trade and offices or premises occupied for the purposes of carrying on any vocation or business. There are the Acts of Parliament, and there is a distinction made, and there is nothing whatever to repeal it, and I should feel myself departing from the distinction which the legislature itself has pointed out, if I were to say that these premises, which would no doubt come within 5 Geo. 4, c. 44, as being offices for the purpose of carrying on business, were offices or premises occupied for the purposes of trade only. By so holding I think we should say there is no distinction between the two, whereas the Act of Parliament says there is. I cannot bring myself to regard telegraphy as a trade. It would be, in my opinion, departing entirely from the ordinary and recognized meaning of the word "trade," to hold that premises occupied either by individuals, or by a company, or by the government, for the purpose of telegraphy, were occupied for the purposes of trade. They would no doubt be occupied for the purposes of carrying on a business of profit within 5 Geo. 4, c. 44, s. 4, but not for the purposes of trade. These offices of the telegraph company would be exempt from taxation as an inhabited house if no person slept there by night, and if they were only used by day; but if a person does sleep there by night, they do not come within the words of this exemption. For these reasons I think the Crown is entitled to our judgment.

POLLOCK, B. In my judgment the appellant is entitled to our judgment, and inasmuch as there is no difference of opinion or any reasonable doubt, after so many decisions upon the same subjects, with regard to the character of the premises, I think it

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will be quite sufficient for me to give my reasons for agreeing with my Lord upon the question of whether or not this telegraph company can be said to be using these premises for the purposes of trade. Now no precise description of the business of this company is given to us, and therefore there is something left, although not much that is material, for us to infer as to what is the nature of the business. The company are described in the case as a telegraph company, limited. It is said that these premises are occupied by them solely for the purpose of carrying on the business of the company. The whole of the orders for the management of the business are issued from the premises so occupied by the company, and all the accounts between the company and their customers, and between the company and their shareholders are kept on such premises. Now, as I understand the business of a company like that, they have not merely to transmit by electric apparatus messages from one part of the world to the other, but they have also to do all those things which are conditions precedent to their doing so, in the way of acquiring machinery and telegraphic communication by wires and cables, and arrangements for the repairs of their cables, involving either the direct purchase of the materials or the entering into contracts for their repair by others who do purchase those materials, and they have also to keep up correspondence and communication with many parts of the world, receiving money and paying money, and having clerks who keep their accounts. Now that being so, is this business which is carried on by them such that they can properly be said, within the meaning of this Act, to occupy these premises for the purposes of trade? There is a rule for the construction of statutes which is well expressed in Maxwell on the Interpretation of the Statutes, ch. 2, s. 1: "In interpreting a statute it is to be borne in mind at the outset that language is always used secundum subjectam materiam, and that it must therefore be understood in the sense which best harmonises with the subject-matter." That, I think, is a very good and a very clear proposition. Now that being so, what was the subject-matter of this statute, and what was the spirit of the distinction to be created? It was a distinction between persons who inhabited houses for the purpose of residence, and persons who occupied "houses," as they were then called, for the purposes

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of trade, and you find coupled with the word "trade," as my Lord has said, such places as warehouses for lodging goods, wares, and merchandise therein, or shops or counting-houses. If it is for me to choose between the rules of construction, I would rather prefer the construction adopted by my Lord than that which has been adopted by my Brother Cleasby in the construction of the latter statute. Some citations were made in the course of the argument from dictionaries, and I would only say that I would personally avoid citing any word from dictionaries as implying in any sense a definition, because that is dangerous, but one may cite from a dictionary, or a work of good repute, to see what is the common acceptation of a word. Richardson's and Webster's dictionaries were cited for the purpose of giving us a definition of the term, but I have found a definition in Johnson's which seems to me to be more near the spirit in which I am construing the words. It is the second meaning which he gives, in which trade is described as an "occupation; particular employment, whether manual or mercantile, distinguished from the liberal arts or learned professions." That is a very fair expression of the meaning of the word in common parlance, when you are speaking of whether a person exercises a profession or whether he carries on trade; and in the same way, whether a person occupies a house for the purpose of dwelling therein personally, or whether he occupies it for the purpose of carrying on a trade.

Now another head of argument, and one of course to which we ought to attend with the greatest care, is that which is used by the learned Solicitor-General in regard to the Bankruptcy Acts, and no doubt the word trade was originally there intended as applying only to persons who either bought or sold, or whose business was immediately cognate to the buying or selling of goods, but even then we find from time to time the words used in a much wider sense; and although we have no right to refer to the enlargement of the number of persons who have been made liable to become bankrupts by different statutes from time to time, we may look at these statutes to see in what sort of sense they used the words themselves. I find in one statute, as far back as James I., that a scrivener may be bankrupt. In 21 Jac. 1, c. 19, s. 2, the words used are, "Or that shall use the trade or

profession of a scrivener, receiving other men's moneys or estates into his trust or custody." Therefore even there you find the word used in a wider sense than that of mere buying or selling. And in Christian's Bankruptcy Law you find thirty or forty pages devoted to considering all the different cases in which, apart from the statute law, persons have been made bankrupts who have not actually been traders in the limited sense of buying, selling, or bartering. I do not think, however, that that is a true guide to our conclusion in this case. I would rather say that, although the statutes relating to bankruptcy present some analogy, they do not present a true analogy, because they were devoted to a very different purpose from that which was the object and intention of the statute which is now under our consideration. Upon these grounds I think the appellant is entitled to our judgment.

Judgment for the appellant.

Solicitors for appellant: *Clarkes, Rawlins, & Clarke.*
Solicitor for the Crown: *Solicitor of Inland Revenue.*

WOODWARD *v.* THE LONDON AND NORTH-WESTERN RAILWAY COMPANY.

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Carriers Act (11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68), *s.* 1—*Painting or Picture—Painted Patterns and Designs.*

The word "paintings" in the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), s. 1, is used in its ordinary and popular sense to denote works of art.

Coloured imitations of rugs and carpets and coloured working designs, each of them valuable and designed by skilled persons and hand painted, but having no value as works of art:—

Held, not to be paintings within the Carriers Act.

THIS was an action to recover the value of certain goods lost through the negligence of the defendants.

At the trial before Cleasby, B., at the Easter sittings in London, 1877, it appeared that the plaintiff was a traveller by the defendants' line of railway, and he had with him three packages which were placed in the luggage-van. One of these was lost on the journey. It contained a number of carpet and rug patterns and carpet designs, designed and painted by hand by

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skilled persons, and varying in value up to 6*l.* or more each, according to the character of the design and the amount of time and skill expended in producing it. The principal defence was, that these articles were paintings within the Carriers Act, and that their value, which in the aggregate was considerable, had not been declared. (1) The learned judge left it to the jury to say if the articles were paintings within the Carriers Act; the jury found that they were not, and returned a verdict for the plaintiff for 148*l.*

A rule was obtained for a new trial on the ground of misdirection, and that the verdict was against the weight of the evidence.

Jan. 14. *Staveley Hill, Q.C.*, and *W. Graham*, shewed cause.

(1) 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1, provides: "Whereas by reason of the frequent practice of bankers and others of sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by land for hire, parcels, and packages containing money, bills, notes, jewelry, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire is greatly increased; and whereas, through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, stage-coach proprietors, and other common carriers, by due diligence to protect themselves against losses arising from their legal responsibility, and the difficulty of fixing parties with knowledge of notices published by such mail contractors, stage-coach proprietors, and other common carriers, with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses: Be it therefore enacted, that from and after the passing of this Act no mail contractor, stage-coach proprietor, or other common carrier by land for hire shall be liable for the loss of or injury to any article or articles or property of the description following (that is to say) . . . paintings, engravings, pictures . . . contained in any parcel or package which shall have been delivered, either to be carried for hire or to accompany the person of any passenger in any mail or stage-coach or other public conveyance, when the value of such article or articles or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail contractor, stage-coach proprietor, or common carrier, or to his, her, or their book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property shall have been declared by the person or persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package."

Grantham, Q.C., and *English Harrison*, in support of the rule.

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Cur. adv. vult.

Feb. 4. CLEASBY, B. The only question in this case was, whether certain painted carpet and rug patterns and painted carpet designs were paintings or pictures within the Carriers Act, 11 Geo. 4 and 1 Wm. 4, c. 68.

The plaintiff, a carpet manufacturer, was a passenger by the defendants' railway, and had with him a parcel containing articles of the above description beyond the value of 10*l.* The parcel was lost, and as the value had not been declared and an increased charge paid, the question was whether the defendants could avail themselves of the protection of the Act, in other words, whether the patterns or designs were paintings or pictures within the Act.

The nature and character of the articles were proved at the trial, and specimens of them were produced. There were some differences between the patterns or models and the designs, and if we thought that one class was within the Act and the other class not, there are materials for entering the verdict or giving judgment accordingly. But as our conclusion is the same as regards them all, it is unnecessary to dwell upon any difference.

It appeared from the evidence that the models were coloured imitations of rugs and carpets painted by hand, and that they were of considerable value, some as much as 6*l.* each, and further, that the value of them depended upon the labour bestowed upon them and the standing in the trade of the person who did them. The coloured working designs were also of considerable value, some of the value of 6*l.* each.

There was no arrangement made to reserve the question for the decision of the judge or the Court, and as the question is properly one of fact for the jury, as was laid down by this Court in the case of *Brunt* v. *Midland Ry. Co.* (1), and in other cases, the question was left to them, and they considered that none of the articles were within the Act, and the verdict was given for the full amount, 148*l.* It seems impossible to regard the question as one of law for the judge to decide, where everything depends upon the effect of the evidence given as to the nature and character of the article, and

(1) 2 H. & C. 889; 33 L. J. (Ex.) 187.

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how it is made, all which may be left in uncertainty, and possibly with contradictory evidence. So far as the construction of the statute goes, it must of course be for the Court; and if there was anything in the Act itself to shew that a particular meaning must be given to the word "painting," as distinct from its natural and ordinary meaning, the jury in deciding the question should have had that pointed out to them. But the only remark to be made upon the language of the statute, as affecting the meaning to be given to the word "paintings," is that the other matters mentioned in connection with it, "engravings, pictures," shew that the statute cannot be construed as meaning everything which has painting done upon it by a workman, it must mean something of value as a painting (value being necessary to make the statute applicable), and something on which skill has been bestowed in producing it. But although the question is, strictly speaking, for the jury, it is a question of fact of such a nature that the Court would feel justified in dealing with the verdict as one on a particular subject, and taking care that the conclusion was not one which was unwarranted by the evidence by granting a new trial if necessary. And now if upon the clear and admitted facts of the case it is clear what the proper legal conclusion is, they would be able to give effect to it at any period of the case.

It appears to me that the verdict was right, and that the articles are not paintings in the ordinary meaning of such a word used in connection with the words, "engravings, pictures." I think they are something different. They are rug patterns, and carpet patterns, and working designs. They would not, in my opinion, be described in any transaction relating to them collectively as paintings, but each would be described by its proper description, rug model, or carpet model, or working design. And according to the evidence the designs would have been registered, but of course under their appropriate name of designs not as paintings. In reality their value is not as paintings for the ordinary purposes for which paintings are valuable as works of art, but from their being attractive models and designs to get orders and to work by.

The case was argued upon the effect to be given to the word "paintings" in the Act: it was hardly suggested that if they did not come within that word they came within the word "pictures,"

They certainly appear to be within the mischief intended to be remedied by the Act, and if there were general words in addition, or if they could be brought reasonably under the description of paintings, the Act ought to apply; but they are something different, and the Act must not be strained to apply to something so different as working designs and patterns. The rule therefore must be discharged.

HAWKINS, J. I am of opinion that this rule ought to be discharged. I think my Brother Cleasby rightly treated the question, whether the lost articles fell within the description of "paintings" in the Carriers Act, as one of fact for the jury to determine. This was expressly decided in *Brunt* v. *Midland Ry. Co.* (1), and I think the jury properly came to the conclusion that they did not.

Looking at the articles themselves which were before us, it is difficult to suppose that anybody would call them "paintings." In the popular and ordinary sense of the word they were clearly not so. They were simply coloured designs or patterns for carpets, and nothing more. It is true they were painted, and painted with great care by hand, and as coloured or painted designs, were possessed of great merit and value; but there was nothing about them to give them the character of "paintings" in the ordinary acceptation of that word. Is the language of the Carriers Act then such as to shew that a wider and more extended interpretation should be given to that term? I think it is not. In the first place, I look to the collocation of the words of the statute, "paintings, engravings, pictures," which to my mind indicates the intention of the legislature that the word should receive its popular signification only. Then I look to the consequences of a wider interpretation, extending the meaning of the word to its literal significance. Looked at thus, it would include everything which was painted. So interpreted, it would include a plainly painted door or panel, &c., &c. It would be absurd to suppose that such was the meaning or intention of the legislature. It is a matter of common knowledge that many beautiful and artistic designs for hangings, paper for walls, muslins, china, &c., representing animals, flowers, landscapes, &c., are so exquisitely

(1) 2 H. & C. 889; 33 L. J. (Ex.) 187.

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drawn and painted that they may partake of the character of paintings in the popular sense, in addition to their character as designs in a commercial sense. Whether they do so or not must always be a question for a jury, subject of course to the control which the Court exercises over verdicts if they are manifestly wrong.

In the statute 5 & 6 Vict. c. 100, relating to the copyright of designs for ornamenting articles of manufacture, the correct description of the articles in question will, it seems to me, be found. Assuming the patterns in question to be new and original, they would clearly fall within the 3rd section of that Act as "designs" applicable for the pattern and ornamenting of carpets. Further light upon the subject may also be derived from the statute 25 & 26 Vict. c. 68, giving copyright in paintings, drawings, and photographs, the 1st section of which confers rights upon the author of "every original painting, drawing, and photograph." It would be exceedingly difficult to suppose that such articles as those in question are protected by this Act as original paintings, and that the author of them should have the power under it to secure to himself the copyright in them for the term of his life, and for seven years afterwards, as the author of an original painting might do, whereas the copyright in designs under 5 & 6 Vict. c. 100, is extended only to very limited periods. That the articles in question are of a similar character to those in respect of which the Carriers Act has afforded protection to carriers, there can be no question, but unfortunately the language of the Act is not such as to include them, and the defect in the Act, if it be one, can only be remedied by the legislature.

It may be asked, how is one to tell whether that which is painted is a painting or a mere painted design? where is the line to be drawn? I answer this question by adopting the language of Pollock, C.B., in *Brunt* v. *Midland Ry. Co.* (1), "The line is shifted according to the circumstances, but the question that we have to answer is not where to draw the line, but whether this is within the line? I think for all practical and reasonable purposes, wherever the line may be, and leaving the line in a state of doubt (which is a doubt that belongs to every line attempted to be

(1) 2 H. & C. 889; 33 L. J. (Ex.) 187.

drawn, either in nature or in the social exigencies of life), that this is without the line." I think therefore that the verdict for the plaintiff ought to stand, and the rule to be discharged.

Rule discharged.

Solicitors for plaintiff: *Rooks, Kenrick, & Co.*
Solicitor for defendants: *R. F. Roberts.*

YOUNG *v.* KITCHIN. *March* 4.

Practice — Assignment of Chose in Action — Set-off and Counter-claim for Damages against Assignee for Breach of Contract by Assignor—Judicature Act, 1873, *s.* 25, *sub-s.* 6—*Order XIX., Rule* 3.

The statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract. The defendant pleaded, by way of set-off and counter-claim, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time whereby the defendant lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor:—

Held, that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor; and that the form of the defence must be amended accordingly.

DEMURRER to part of a set-off and counter-claim.

The statement of claim contained the following allegations:—Downs & Co. having contracted with the defendant to erect certain buildings for him at a schedule of prices completed them by the 1st of October, 1876, and the defendant then entered into possession of them. At that time there was due from the defendant to Downs & Co. in respect of the contract a balance of 6084*l.*, and all conditions had been performed, &c., necessary to entitle Downs & Co. to recover that sum from the defendant. By deed on the 5th of November, 1877, Downs & Co. assigned to the plaintiff all their interest in the debt of 6084*l.*, and on the 6th of November the plaintiff gave the defendant notice of the deed, but the defendant had never paid the debt.

The statement of defence, after denying most of the allegations in the statement of claim, and alleging that by reason of defects

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in the work and otherwise there was nothing due to Downs & Co., proceeded as follows by way of set-off and counter-claim against the plaintiff as assignee of Downs & Co.:—

The 6th paragraph alleged that on the 6th of January, 1876, an agreement was made between the defendant and Downs & Co., whereby, in consideration that the defendant would employ Downs & Co. to erect certain buildings at certain prices, they promised to complete and deliver the buildings to the defendant in August and September, 1876, respectively; that the works were to be paid for by the defendant on the architect's certificate as they proceeded, and that defects (if any) were to be remedied or allowed for by Downs & Co.

The 7th paragraph alleged that the defendant did all things necessary to entitle him to have the agreement performed, but Downs & Co. did not deliver the buildings to him till November, 1876, and August, 1877, respectively, whereby the defendant was unable to let the buildings for the reception of hops, for which purpose they were erected, as Downs & Co. knew when the agreement was made, whereby the defendant had lost much money.

The 8th paragraph alleged that there were defects in the buildings when delivered up which had not been remedied or allowed for by Downs & Co.

The defendant claimed 2400*l.* damages for not delivering the buildings to him at the respective times agreed on; and 800*l.* damages for the defects.

Demurrer to so much of the 7th paragraph as alleged breaches of contract by Downs & Co., on the ground that the plaintiff, as assignee of Downs & Co., could not be held liable for them, and that they constituted no answer to the action, and on other grounds sufficient in law.

Feb. 16. *Bush Cooper*, for the plaintiff. The part demurred to cannot be allowed, either as a set-off or as a counter-claim against the assignee, but is the subject only of a cross-action against the assignor. Otherwise a defendant might get judgment on the claim by shewing that the debt could not be recovered on one ground, e.g., that the debt was not effectually assigned, or that due notice was not given to the defendant, and might also

get judgment and recover damages on the counter-claim on another ground, e.g., that the assignor had not fulfilled his contract. The result would be that the plaintiff would not only lose his right to the debt, but have to pay damages for a liability incurred not by him but by the assignor. The defendant can only counter-claim under Order XIX., Rule 3, which enacts that "such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action." That is, it shall have no further effect than a claim in a cross-action against the plaintiff. But the defendant could not bring a cross-action against the plaintiff for a breach of contract to which the plaintiff was no party.

Bompas, Q.C. (*Clare* with him), for the defendant. Before the Judicature Acts a defendant, in an action to recover the sum agreed on for work done under a contract, might in reduction of damages give evidence that the plaintiff had not performed his part of the contract: *Allen* v. *Cameron.* (1) And now, by Order XIX. Rule 3, the defendant might set off against the assignor any cross-claim, whether sounding in damages or not. Whatever defence might be set up against the assignor may be set up against his assignee, for the assignee cannot be in a better position than his assignor. The plaintiff's right to sue is entirely created by the Judicature Act, 1873, s. 25, sub-s. 6, which enacts that the assignment of a debt or other legal chose in action shall be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed." In equity the assignee could recover only the balance, after deducting the sum which the defendant was entitled to recover from the assignor. It will be a great hardship on the defendant if, when an insolvent creditor assigns his claim, the assignee can recover the whole debt from the debtor, while the latter is left to a fruitless remedy against a bankrupt assignor.

B. Cooper, in reply. The agreement to pay for the buildings is quite separate from the agreement to complete them, and the right to payment is independent of the time of delivery. The counter-claim ought at least to have been confined to a reduction of damages.

(1) 1 Cr. & M. 832.

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[The Court, CLEASBY, B. There are two objections taken to the defence—one of substance and the other of form. In substance I think the defendant is entitled to the benefit of this defence in reduction of the plaintiff's claim. The Judicature Act, 1873, s. 25, subs. 6 (1), says that the assignment of a debt or other legal chose in action shall be "subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed," that is, subject to all equities which would be enforced in a court of equity. I think this is a case where, in equity, the whole matter might be dealt with and the plaintiff's claim settled, after deducting all that ought to be deducted in respect of the failure to complete and deliver the buildings. (2) That is my opinion on the general merits; but on the question of form I will consider the pleadings.]

Cur. adv. vult.

March 4. CLEASBY, B. In this case the principal question was disposed of upon the argument by holding that the defendant was entitled, by way of set-off or deduction from the plaintiff's

(1) Subs. 6 enacts: "Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor . . . ."

Order XIX., Rule 3: "A defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross claim. But the Court or a judge may, on the application of the plaintiff before trial, if in the opinion of the Court or judge such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof."

(2) See *Tooth* v. *Hallett*, Law Rep. 4 Ch. 242, and the cases collected in 2 Tudor's Leading Cases in Equity, notes to *Ryall* v. *Rowles*, p. 800, 5th ed.

claim, to the damages which he had sustained by the non-performance of the contract on the part of the plaintiff's assignor.

Another question remained, upon the form of the defence and counter-claim; and it rather appeared to me that the counter-claim was in such a form (claiming, as I thought it purported to do, damages against the plaintiff) that the 7th paragraph shewed no title to such a claim, and was therefore demurrable.

The form has been followed of a counter-claim in an ordinary case, where the plaintiff does not sue as the assignee of a chose in action, and where the defendant is entitled to judgment for the balance of his counter-claim if it overtops that of the plaintiff. But this is not the case here; the defendant has no claim to recover anything against the plaintiff; he only meets the plaintiff's claim by a counter-claim of damages arising out of the same contract, and this ought to appear upon his defence and counter-claim.

The above objection would apply equally to the allegation of the 8th paragraph, which is not demurred to. And this rather shews that the plaintiff did not intend by his demurrer to rely upon this formal objection, but to raise the substantial question which has been decided, and the defendant has been misled, or he might have amended the formal defect.

The proper course is, I think, to overrule the demurrer, the costs to be costs in the cause, the defendant to be at liberty to amend his claim by shewing that he does not claim to recover damages against the plaintiff, but only to set them off against the plaintiff's claim.

Judgment accordingly.

Solicitor for plaintiff: *A. H. Miller.*
Solicitor for defendant: *Pettengill.*

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Feb. 5.

BAKER, APPELLANT; CARTER, RESPONDENT.

Coal Mines Regulation Act, 1872 (35 & 36 *Vict. c.* 76), *s.* 51—*Liability of Owner for Contravention of General Rule by another Person.*

The Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51, after providing general rules to be observed in every mine to which the Act applies, enacts that in the event of any contravention of, or non-compliance with, any of the general rules by any person whomsoever being proved, the owner, agent, and manager shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the said rules as regulations for the working of the mine to prevent such contravention or non-compliance.

An information was preferred under this section against the part owner of a coal mine, in which one of the general rules regulating the employment of machines had not been complied with. The evidence was that the general rules were put up in various parts of the mine, and that the defendant occasionally visited the mine, but resided at a distance, and took no part in the management, which was under the exclusive control of the certificated manager, who was also part owner. The defendant was not examined as a witness, as he might have been under s. 63, sub-s. 4, but it was admitted that he had not personally taken any means to enforce the rules. The justices found as a fact that the defendant had taken all reasonable means by publishing, and to the best of his power enforcing, the rules as regulations for the working of the mine to prevent such non-compliance, and dismissed the information:—

Held, that there was evidence from which the justices might properly come to that conclusion.

CASE stated under 20 & 21 Vict. c. 43.

At a petty sessions holden at Wednesbury on the 16th of October, 1877, in the county of Stafford, an information was preferred under s. 51 of 35 & 36 Vict. c. 76, by the appellant, Her Majesty's inspector of mines, against the respondent, for neglecting to observe the 22nd general rule of that section, which provides: "There shall be on the drum of every machine used for lowering or raising persons such flanges or horns, and also, if the drum is conical, such other appliances as may be sufficient to prevent the rope from slipping."

Upon the hearing of the information it was admitted by the parties, and found by the justices as a fact, that the respondent was joint owner, with one Beddow, of the Golds Green Colliery, situate at West Bromwich; that Beddow was then the certificated manager of the colliery, and had the exclusive management of it, but had since died; that the drum of the machine used for lowering

and raising persons at a pit in the colliery then being cleansed and repaired was not provided with such flanges or horns as were sufficient to prevent the rope from slipping, as required by the 22nd general rule; that the rope slipped off the drum, and coiled upon the square drum shaft, the sharp angles of which nearly severed the rope, and when the engine man attempted to uncoil the rope it parted at the drum shaft, and the iron water barrel attached to the rope with the rope fell down the pit and killed two men engaged at the bottom of the pit shaft.

It was thereupon contended, on the part of the appellant, that Beddow, as the certificated manager, had not complied with the 22nd general rule, and was consequently, according to the last paragraph of s. 51 of 35 & 36 Vict. c. 76, guilty of an offence against that Act, and inasmuch as the same section proceeded to enact—"That in the event of any contravention of, or non-compliance with, any of the said general rules in the case of any mine to which this Act applies by any person whomsoever being proved, the owner, agent, and manager shall each be guilty of an offence against this Act,"—that the respondent being an owner of the mine was also guilty of an offence against the Act.

For the defence the respondent quoted the concluding part of the same section of the Act—"unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the said rules as regulations for the working of the mine, to prevent such contravention or non-compliance," and contended that the respondent had taken all reasonable means, by the appointment of a certificated manager, who was part owner and sole manager of the colliery, and by publishing, and to the best of his power enforcing, the said rules as regulations of the working of the mine, to prevent such non-compliance. The respondent called as a witness the clerk at the colliery, who said as follows: "On the 12th of March Beddow was the certificated manager, and had the entire management. The respondent, a gentleman in Birmingham, was a partner in the colliery. He took no part in the management. The general rules under the Act of Parliament are published at the colliery. They are stuck up in the office, the engine-house, and the pit-hovel. They are there now. On the 12th of March, and preceding it, Beddow was

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regularly at the colliery. His illness prevented him from attending sometimes. He was the only person who took any part in the management. He was there on the very day of the accident. I have seen the respondent there."

It was alleged for the defence that the respondent had not in any way taken part or interfered in the management of the mine or colliery, and admitted that he had not personally taken any means to enforce the rules as regulations for the working of the mine.

The justices found as a fact that the respondent had taken all reasonable means by publishing and, to the best of his power, enforcing the rules, as regulations for the working of the mine, to prevent such non-compliance with any of the general rules, and gave their determination against the appellant in the manner above stated.

The question of law for the opinion of the Court is, whether the mere fact of the rules having been published at the colliery, and in the absence of evidence that the respondent had personally done any act towards enforcing such rules, but had left the entire management to his partner and certificated manager, was sufficient in point of law to warrant the justices in coming to the above determination.

Gorst, Q.C. (*Reginald Brown* and *Muir Mackenzie* with him), for the appellant. There was no evidence upon which the justices could find that the respondent had used all reasonable means to prevent a contravention of the rules, the only evidence being that the rules were published by some one, and that the mine was managed by a certificated manager. The respondent is concluded by the admission that he had done nothing whatever towards enforcing the rules. It was not even proved that it was the respondent who had published them. By s. 63, sub-s. 4, "The owner, agent, or manager may, if he think fit, be sworn and examined as an ordinary witness in the case, where he is charged in respect of any contravention or non-compliance by another person." The respondent ought at least to have been called as a witness. He might have proved he had weekly reports from the manager, or taken some other means to enforce the rules. It is quite consistent with the case that he may have actually approved the machine in question, and seen it in work.

R. E. Webster, for the respondent, referred to a similar general rule in 23 & 24 Vict. c. 151, s. 10, r. 11.

Gorst, Q.C., replied.

CLEASBY, B. I think there was enough to justify the magistrates in coming to the conclusion that the respondent had taken all reasonable means by publishing, and to the best of his power enforcing, the rules as regulations for the working of the mine, to prevent such non-compliance with any of the general rules. This is an important matter, involving serious considerations to the owners of mines, but of course that must not lead us to come to any conclusion not warranted by the words of the statute.

The state of things was this. The mine was owned by the respondent and Beddow as partners. Beddow was the certificated manager. Now the Act requires, by s. 26, that the mine "shall be under the control and daily supervision of a manager," and "a person shall not be qualified to be a manager of a mine to which this Act applies unless he is for the time being registered as the holder of a certificate under this Act." That is, no doubt, consistent with any other person who is an owner taking part in the management; but the owner is bound by s. 26 to appoint some competent person to be the manager, and if the mine is worked for more than fourteen days without there being a certificated manager, the owner is liable to a penalty, "unless he prove that he had taken all reasonable means by the enforcement of this section to prevent the mine being worked in contravention of this section."

There is also this additional fact, that the certificated manager, under whose control and daily supervision this mine was, had the exclusive management of it. Is not a man who has a share in a mine justified in leaving the management to a person who has the daily supervision of the mine, and who, the Act says, *shall* have the control of it? There is no statement in the case as to how the defect arose, whether by the default of Beddow or not. It is, perhaps, accounted for by his illness, though it appears that he was there on the day in question.

I think we ought not to interfere with the conclusion of the magistrates, and I base my decision on this, that a proper person, a certificated manager under the Act, had been appointed to see that everything was done that ought to be done. A point occurred

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to me which Mr. Webster urged in his argument. Suppose an owner contravened Rule 29, which requires that "a competent person or competent persons who shall be appointed for the purpose shall once at least in every twenty-four hours examine the state of the external parts of the machinery, and the state of the head-gear, working places, levels, planes, ropes, chains, and other works of the mine which are in actual use," &c. How is it possible for an owner living at a distance to see that that rule is never contravened? If it is contravened, surely the owner will be able to discharge himself if he proves that a competent person, certificated under the Act, has been appointed manager.

It would be straining the law if—where a part owner, perhaps living at a great distance, has taken care to have the rules published, and appointed a competent person, a certificated manager under the Act, to have the control and daily supervision of the mine,—we were to hold that the magistrates before whom the case comes are not at liberty to find that the part owner had taken all reasonable means to prevent a contravention of the rules. The magistrates have found that as a fact in the present case, and I should be very sorry to call their finding in question.

POLLOCK, B. I have come to the same conclusion, though at first I entertained considerable doubt on the question as left to us by the magistrates. But the facts go beyond the question as so left to us, and our decision rests on the facts, and not on the form of the question. The defendant, though he was occasionally at the mine, lived at Birmingham and took no part in the management, which was under the exclusive control of the defendant's part owner, who was a certificated manager. I ask myself, after reading the last clause in s. 51, what are the reasonable means which a non-resident owner would take to enforce the rules? He would appoint a certificated manager to reside at the mine and take all the management. That is what was done here, and on this ground I think the finding of the justices was warranted by the evidence.

Appeal dismissed with costs.

Solicitors for appellant: *Sharp & Ullithorne.*

Solicitors for respondent: *Doyle & Sons, for Henry Jackson, West Bromwich.*

GIRDLESTONE *v.* THE BRIGHTON AQUARIUM COMPANY.

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March 4.

Sunday Profanation—21 *Geo.* 3, *c.* 49, *ss.* 1, 4—*Action for Penalties—Judgment obtained by Covin and Collusion no Bar—Covin and Collusion, what is Evidence of.*

The defendants having, on Sunday, the 15th of August, 1875, kept open the Brighton Aquarium as a place of public entertainment, and thereby incurred a penalty under 21 Geo. 3, c. 49, the plaintiff, on the 17th, brought an action to recover the penalty, but omitted to specify in the writ the Sunday in respect of which he was suing. On the 20th of October, R. brought an action against the defendants claiming penalties in respect of the 15th of August and all the Sundays intervening between that date and the issue of R.'s writ; and on the 28th of October judgment was signed in R.'s action by default. This judgment the defendants pleaded in bar of the plaintiff's action, and the plaintiff replied that the judgment was obtained by covin and collusion. At the trial of the plaintiff's action, in 1877, it was proved that R.'s action was brought at the request of the defendants, their object being to protect themselves from all actions in respect of the penalties included in R.'s action, and also to obtain, as soon as possible, from the Secretary of State a remission of the penalties under 38 & 39 Vict. c. 80. When R.'s action was brought he did not know of the existence of the plaintiff's action, but he agreed verbally that the defendants might make what use they pleased of his action, and that he would not issue execution or claim penalties. The judge directed the jury that the above circumstances disclosed ample evidence of covin and collusion, and the jury found a verdict for the plaintiff:—

Held, first, that the judgment in R.'s action was obtained by covin and collusion, and could not affect the rights of third parties; and that the verdict ought not to be disturbed:

Secondly, that independently of covin and collusion, the penalty sued for in the plaintiff's action became a debt to him as soon as the writ was issued, and his right to recover could not be affected by any subsequent action; and that since the plaintiff was in fact suing in respect of the 15th of August, and the defendants knew it, the fact of the date not having been specified in the writ was immaterial.

Affirmed in the 4 *Ex. D.* 107, C.A.

THE statement of claim (delivered on the 24th of November, 1875) alleged that the defendants, on Sunday, the 15th of August, kept open the Brighton Aquarium as a place of entertainment and amusement for the public, who were admitted by the payment of money, contrary to 21 Geo. 3, c. 49, and claimed the penalty of 200*l.* given by s. 1.

The statement of defence alleged that the defendants were

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heretofore sued in the Court of Common Pleas, in an action at the suit of Rolfe, for the same cause of action and in respect of the same Sunday named in the statement of claim, and for the same penalty, and that judgment was signed against the defendants in Rolfe's action on the 28th of October, 1875, and still remained in force.

The plaintiff's reply took issue on the statement of defence, and denied that in Rolfe's action judgment was recovered for the same cause of action in respect of the same Sunday in respect of which the present plaintiff was suing; and further alleged that Rolfe's action was prosecuted and judgment recovered by covin and collusion between the defendants and Rolfe. Issue thereon.

At the trial before Cleasby, B., in Middlesex, in April, 1877, it appeared that the writ in this action was issued on the 17th of August to recover a penalty of 200*l.* under 21 Geo. 3, c. 49, incurred by the defendants for having opened the aquarium as a place of public entertainment or amusement on Sunday, the 15th of August. The writ did not shew in respect of what day the penalty was claimed. The defendants opened the aquarium on the 15th of August, and on each succeeding Sunday up to and including the 17th of October. In that month their solicitor communicated with one Rolfe, and obtained his leave to bring an action in his name against the defendants for penalties, Rolfe verbally agreeing that the defendants should be at liberty to make any use they pleased of the action, and that he would not issue execution or claim any penalties. Rolfe did not then know of the present action having been brought. The defendants' solicitor, by arrangement with Rolfe's solicitor, issued a writ in Rolfe's name against the defendants on the 20th of October, claiming penalties for each Sunday from the 15th of August to the 17th of October, both inclusive, and judgment was signed by default on the 28th of October. The defendants' solicitor admitted that the object of the defendants in taking this course was that Rolfe's action might protect them against all other actions in respect of each of those Sundays, and to ascertain in what manner the Home Secretary intended to use the power to remit penalties given him by 38 & 39 Vict. c. 80.

The plaintiff contended that this evidence proved covin and collusion, and that, independently of that question, the statute 21 Geo. 3, c. 49, ss. 1, 4 (1), made the penalty a debt from the defendants to the plaintiff as soon as the writ was issued, and that no subsequent action could affect the right to recover that debt. The defendants contended that as the latter point did not appear upon the pleadings it could not now be raised. Cleasby, B., told the jury that on the above facts there was ample evidence of covin and collusion, and left that issue to them, and they found a verdict for the plaintiff.

A rule nisi having been obtained to set aside the verdict and the judgment (if any) and enter a verdict for the defendants on the ground that on the facts proved there was no evidence of covin and collusion; or for a new trial on the ground that the learned judge misdirected the jury in not telling them that there was no evidence of covin and collusion; and in telling them that the judgment in Rolfe's action was a form and of no effect, and that judgment in any action not brought for the purpose of enforcing judgment was collusive and covinous; and in not telling them that in order to be collusive and covinous the judgment in Rolfe's action must have been fraudulently or deceitfully procured, and that to constitute covin and collusion there must be secret agreement or assent between two or more persons, with a view to the defrauding or prejudicing of another; and on the ground that the verdict was against the weight of evidence:—

Feb. 6, 7. *Bosanquet* (*Wilberforce* with him), for the plaintiff, shewed cause, and contended first, that there was ample evidence

(1) Sect. 1 enacts that "any house, room or other place which shall be opened or used for publick entertainment or amusement, or for publickly debating on any subject whatsoever, upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money or by tickets sold for money, shall be deemed a disorderly house or place; and the keeper of such house, room or place shall forfeit the sum of 200*l.* for every day that such house, room or place shall be opened or used as aforesaid on the Lord's Day, to such person as will sue for the same. . . ."

Sect. 4 enacts that "any person entitled to either of the aforesaid forfeitures may sue for the same by action of debt in any of his Majesty's Courts of Record at Westminster. . . ."

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of covin and collusion; secondly, that even if there was no such evidence Rolfe's judgment was no answer to Girdlestone's action, inasmuch as the writ in the latter was issued first: *Combe* v. *Pitt* (1); *Jackson* v. *Gisling* (2).

C. Russell, Q.C., and *Macdonell* (*McMillan* with them), for the defendants, in support of the rule. First, Rolfe's action was not collusive or covinous, but was brought with the twofold object of protecting the defendants and ascertaining the opinion of the Home Secretary as to the use to be made of the Remission of Penalties Act, 1875 (38 & 39 Vict. c. 80). The learned judge omitted to direct the jury that fraud must be found in order to establish collusion: *Fermor's Case* (3); and 6 Vin. Abr. p. 474, tit. Covin. Co. Litt. 357 (b), defines covin as "a secret assent determined in the hearts of two or more to the defrauding and prejudice of another." To establish covin and collusion there must be evidence of fraud on the part of Rolfe as well as of the defendants: *Meriel Tresham's Case* (4). Fraud on the defendants' part alone would not suffice: *Meddowcroft* v. *Huguenin* (5), and *Perry* v. *Meddowcroft* (6). There could be no fraud, covin, or collusion, since Rolfe, when he made the agreement in question, did not know of Girdlestone's action. The fact that the defendants incited Rolfe to bring an action would not of itself constitute collusion: *Gethin* v. *Gethin* (7); *Blundivell* v. *Loverdell* (8). The object of the defendants being to bring a case before the Home Secretary to be decided on its merits, the agreement cannot be called collusive: *Donegal* v. *Donegal* (9); *Shaw* v. *Gould* (10). As to the second point the rule laid down in *Combe* v. *Pitt* (1) is no longer in force; it was by implication repealed by the Uniformity of Process Act (2 Wm. 4, c. 39). Even if the rule still subsists, the plaintiff has not put himself within it, since his writ does not specify the Sunday in respect of which he sues, and the statement of claim might have specified any other Sunday. A right of

(1) 3 Burr. 1423.
(2) 2 Str. 1169.
(3) 3 Rep. 204.
(4) 9 Rep. 108 (a).
(5) 4 Moo. P. C. 386.
(6) 10 Beav. 122.
(7) 31 L. J. (P. & M.) 43.
(8) Sid. 21.
(9) 3 Phill. Ecc. Ca. at p. 601.
(10) Law Rep. 3 H. L. 56.

action in respect of the 15th of August could not be said to vest in the plaintiff by the issue of a writ which did not specify that date. Moreover the plaintiff ought to have raised this point on the pleadings, and not having done so he cannot avail himself of it now.

Cur. adv. vult.

March 4. The judgment of the Court (Kelly, C.B., Cleasby and Pollock, BB.) was delivered by

CLEASBY, B. The facts of this case are not in dispute. It is admitted that the plaintiff brought his action on the 17th of August to recover a penalty under the statute 21 Geo. 3, c. 49. This made the penalty, if recoverable, a debt from the company to the plaintiff. It is further admitted that afterwards, on the 20th of October, the defendants got permission from a man named Rolfe to bring an action for penalties in his name. It was not disputed that this action was a protective action, that is to protect the defendants from the various penalties which were accruing by being used as an answer to actions which might be brought for the various penalties included in it. It was brought in respect of penalties accruing on the 15th of August (the penalty sought to be recovered by the statement of claim in this action) and the several Sundays between that day and the 17th of October. Judgment was recovered in that action by default on the 28th of October. Proof was given that the proceedings in the name of Rolfe were taken with another view as well, viz., to obtain as soon as possible a remission of the penalties by the Secretary of State, under 38 & 39 Vict. c. 80. But this collusive proceeding for an innocent purpose did not make it a real recovery of the penalty by the defendants against themselves, or prevent it from being collusive for an injurious purpose, viz., to deprive others of the right to recover the penalties which had accrued.

It appears to us, therefore, that such a fictitious judgment is no judgment at all to affect the rights of third parties. The question arose at the trial, upon the reply that the judgment was obtained by covin and collusion. Now, it can hardly be questioned that it

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was by collusion that the judgment was obtained against the defendants by the defendants in the name of Rolfe, for whatever purpose it was obtained, and as to its being covinous, the definition of covin was given in the argument from Coke upon Littleton, and we have it very clearly given in the Termes de la Ley (ed. 1708)—"Covin is a secret assent determined in the minds of two or more to the prejudice of another." In the present case the secret assent was the assent of Rolfe to the defendants borrowing his name to bring the action against themselves, and the prejudice of another was the judgment being used, as in the present case, to defeat the rights of others. It matters not whether Rolfe was kept in ignorance of the purpose to which the action was to be applied or not, it was not the less covinous in the defendants.

One instance is put in the same book (Termes de la Ley) under the title "covin," of the use of a judgment fraudulently obtained. "Or if an executor or administrator permit judgments to be entered against him by fraud and plead them to a bond . . . . the party grieved may plead covin and relieve himself." In like manner, it appears to us, that the plaintiff may relieve himself by pleading covin as an answer to the judgment obtained by the defendants.

We were referred to certain passages in the summing up of the learned judge to the effect that if the judgment was obtained collusively, and not intended to operate as a judgment, that would be sufficient. If those passages be taken by themselves they might mislead the jury, but taken in connection with the circumstances of the case and the rest of the summing up they would not do so. The plea itself shewed the injurious purposes to which the judgment was applied, and as soon as it was admitted that it was intended to be protective, that part of the case did not require to be particularly referred to. And, further, even if there was an imperfect direction in this particular, yet, as it is clear that no substantial wrong or miscarriage has been occasioned thereby, we ought not to grant a new trial: see Order XXXIX., Rule 3, Judicature Act, 1875.

Another objection to the defence was presented at the trial and has been argued before us. It did not appear to arise upon the

pleadings, and was therefore put aside at the trial; but if a new trial were granted, and the statement of defence amended, there would be an answer to the plea. The present action was brought on the 17th of August, and the penalty sought to be recovered was in respect of the opening of the Aquarium on the 15th of August. The effect of bringing the action was to make the penalty a debt due to the plaintiff, and no other action could afterwards be maintained in respect of it: *Jackson* v. *Gilling* (1); *Hutchinson* v. *Thomas* (2); see also *Combe* v. *Pitt* (3); though in that case the plea was in abatement. It follows that upon its appearing that the present action was commenced before Rolfe's action, the proceedings in Rolfe's though prosecuted to judgment could have no effect upon the right of the plaintiff. The only answer that could be given to this objection was, that it did not appear upon the face of the writ that it was sued out in respect of the forfeiture of the 15th of August, and that any other Sunday upon which there had been a performance might have been inserted in the statement of claim. But as there is no doubt that the action of the 17th was in respect of the previous Sunday, the 15th, and as the defendants knew that the action was in respect of that Sunday, it appears to us to make no difference that the writ does not specify the date: see the judgment of Parke, B., in *Reg* v. *Bird.* (4)

The case of *Chalchman* v. *Wright* (5) is an authority upon the whole case. It shews that previous proceedings are a bar to subsequent proceedings for the same penalty, and that proceedings to be a bar must be bonâ fide. It was there decided that a previous information for the same penalty is a good bar if it be bonâ fide, but if it be not bonâ fide the plaintiff may plead the fraud. Otherwise the defendants could keep the Aquarium open and incur a penalty every Sunday, and get a friend on every Monday morning to bring an action, and make these fictitious actions a defence to real ones, and so defeat the Act of Parliament.

The jury in the present case found that the judgment was

(1) 2 Str. 1169.
(2) 2 Lev. 141.
(3) 1 W. Bl. 437; S. C. 3 Burr. 1423.
(4) 20 L. J. (M.C.) at p. 94.
(5) Noy's R. 118.

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covinous and collusive, and for the above reasons we think we ought not to grant a new trial, and therefore the rule must be discharged.

Rule discharged.

Solicitors for plaintiff: *Bridges, Sawtell, Heywood, & Co.*
Solicitors for defendant: *Benham & Tindell.*

1877
Dec. 20.

[IN THE COURT OF APPEAL.]

MULLIN *v.* MONICO.

Practice—Performance under Judicature Act, 1873, *ss.* 56, 57—*Official Referee—Reference for Report—Reference for Trial.*

The Court or a judge has no power under ss. 56, 57, to order an action to be referred to an official referee, for s. 56 only allows any question arising in a cause to be referred for inquiry and report, and the report may or may not be adopted by the Court; and s. 57 only allows any question or issue of fact, or any question of account, to be tried before an official referee if the parties consent in any cause, and if they do not consent in any cause requiring a prolonged examination of documents or accounts, or any scientific or local investigation.

An official referee has no power to order judgment to be entered on any question referred to him under ss. 56, 57 of the Judicature Act, 1873.

This case is reported 3 C. P. D. 142.

[IN THE COURT OF APPEAL.]

1878
Jan. 30.

TURNER *v.* THE HEDNESFORD GAS COMPANY.

Practice—Counter-claim—Rules of the Supreme Court, Order XXII., Rule 5—*Words "Question between Defendant and Plaintiff along with any other Person or Persons"—Order XVI., Rule* 3—*Judicature Act*, 1873, *s.* 24, *sub-s.* 3.

8 Ch D. 45
11 QBD 468

A defendant is entitled to add a third person as party to the action if the defendant's counter-claim shews a question arising between himself and the plaintiff along with that third person, and relating to the cause of action sued upon by the plaintiff, even although the third person could not be a party to the plaintiff's original claim.

Claim for damages for preventing the plaintiff from completing certain work pursuant to a contract with the defendants. Defence: that by a clause in the contract the defendants had power to take the work out of the plaintiff's hands if he failed to do it properly; that the plaintiff did so fail, and the defendants took the work out of his hands; and, by way of counter-claim, that owing to the plaintiff's breach of contract the defendants did expend 256*l.* in excess of what it would have cost them if the plaintiff had fulfilled his agreement; and that one R. had, by a general bond, bound himself in the sum of 200*l.* for the proper execution of the work, and they sought to recover 256*l.* from the plaintiff, and 200*l.* under the bond, from R. The defendants having served R. with the defence and counter-claim pursuant to Order XXII., Rule 6, R. moved to strike out the counter-claim:—

Held, reversing the decision of the Exchequer Division, that the claim for relief by the defendants against R., by way of counter-claim, was a question arising between the defendants and the plaintiff along with R. within the meaning of Order XXII., Rule 5; and the defendants were entitled to add R. as party to the action.

CLAIM for preventing the plaintiff from completing certain work pursuant to a contract with the defendants.

Defence: that the agreement contained a clause that provided, if the plaintiff failed to carry out the work with the requisite expedition, or according to the instructions of the defendants' engineer, the defendants might take the work wholly or in part out of the plaintiff's hands; that the plaintiff did so fail, and that the defendants took the work out of the plaintiff's hands and completed it themselves. And by way of counter-claim the defendants set up that the defendants, owing to the plaintiff's breach of

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contract, had been obliged to spend 850*l.* in completing the work, being 256*l.* in excess of what it would have cost them if the plaintiff had fulfilled his agreement; the counter-claim also set out a bond executed by Round, in which he had bound himself to be answerable to the defendants to the extent of 200*l.* for the proper execution of the contract by the plaintiff to the entire satisfaction of the defendants' engineer.

The defendants, by the counter-claim, sought to recover 256*l.* from the plaintiff, and 200*l.* under the bond from Round.

The defendants served Round with the defence and counter-claim pursuant to Order XXII., Rule 6; and the master, on a summons at the instance of Round, having made an order that the counter-claim be struck out, the order was reversed by Pollock, B., at chambers. Round appealed to the Exchequer Division.

Jan. 15. *Moulton*, for Round.

Anderson, for the defendants.

CLEASBY, B. This case has been fully argued, and we have arrived at the conclusion that this counter-claim ought not to stand in its present form. The ground on which we act is that a counter-claim must ask relief against the plaintiff, either separately or jointly with some other person. That has been decided, and the very nature of a counter-claim seems to require it. A defendant is enabled to join another party in a counter-claim provided the relief is sought against the plaintiff also.

What is the counter-claim here? Can it be said to claim relief against the plaintiff and Round together? Does it seek relief against Round in respect of the same matter as against the plaintiff? We think not. The statement of defence and counter-claim are to this effect: as an answer to the action the defendants set up a clause in the agreement which entitled them, upon the failure of the plaintiff to do certain things, to take the work out of his hands and do it themselves. Then the counter-claim against the plaintiff is, that owing to the plaintiff's default the defendants were obliged to spend 850*l.*, being 256*l.* in excess of what it would

have cost them if the plaintiff had fulfilled his contract. How can it be said that that is a claim against Round, who is the obligor of a bond given as security for the proper execution by the plaintiff of the contract? It does not appear that the bond was in the same terms as the agreement between the plaintiff and defendants. I do not, indeed, dwell on that as important, but this consideration occurs to me. If all that the defendants had alleged had been matter which shewed they had a defence against the action arising out of the contract, could they have had a counter-claim against Round? No one would say they could. Clearly the counter-claim must have been against the plaintiff, or against him jointly with some one else. We are dealing here with a counter-claim under an order of the Judicature Act, and we must see that it comes within the order. We are not dealing with a case where a defendant gives notice to another party, but where he is seeking to add a party to his counter-claim. Well, then, does the circumstance that the defendants have also a counter-claim against the plaintiff, in respect of the 256*l.* excess which his default has cost them, justify them in bringing in Round as a party simply because he gave a bond, when the only ground of their counter-claim against the plaintiff is the recovery of the 256*l.*, with which Round has nothing to do? I think not. The two counter-claims are quite separate and distinct.

The counter-claim against the plaintiff must therefore stand, and that against Round be struck out.

HAWKINS, J. I am entirely of the same opinion. If there had been no counter-claim against the plaintiff, it would have been impossible to make Round a party, and set up a counter-claim against him singly. Now it is sought to bring Round in on a matter with which the plaintiff has nothing to do.

Order of Pollock, B., rescinded with costs.

Jan. 30. The defendants appealed.

Matthews, Q.C., and *Anderson*, for the defendants. The decision

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of the Exchequer Division cannot be supported. The case comes within Order XXII., Rule 5 (1), and Round was properly made a party to the suit. The counter-claim raises questions between the defendants and the plaintiff along with Round, and those questions are of such a nature that the defendants might have brought an independent action against the present plaintiff and Round, for under Order XVI., Rule 3 (2), all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. In *Child* v. *Stenning* (3) it was pointed out that, in order to enable a plaintiff to join two persons as defendants, the causes of action between them need not be identical. As the plaintiff and Round might have been sued in one action, the present defendants are entitled to enforce their right against Round by way of counter-claim in the present suit. The claim to compel payment of the amount secured by the bond is relief "relating to or connected with the original subject-matter of the cause": s. 24, sub-s. 3 of the Judicature Act, 1873 (4); because the plaintiff's claim is that he has been prevented from carrying out a contract, and the defendants

(1) Order XXII., Rule 5: "Where a defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff, along with any other person or persons, he shall add to the title of his defence a further title, similar to the title in a statement of complaint, setting forth the names of all the persons who, if such counter-claim were to be enforced in a cross-action, would be defendants to such cross-action, and shall deliver his defence to such of them as are parties to the action within the period within which he is required to deliver it to the plaintiff."

(2) Order XVI., Rule 3: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative. And judgment may be given against such one or more of the defendants as may be found to be liable according to their respective liabilities, without any amendment."

(3) 5 Ch. D. 695.

(4) By s. 24, sub.-s. 3 of the Judicature Act, 1873, the Courts respectively and every judge thereof shall have power to grant to any defendant . . . all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of Court or any order of the Court as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose.

allege that he has committed a breach of the same contract, for which breach, Round, as the plaintiff's surety, is bound to compensate the defendants, and unless the alleged breach is proved, the liability of Round does not arise. In *Dear* v. *Sworder* (1) the plaintiffs, second mortgagees, claimed to be paid out of the proceeds of a sale to be completed pursuant to a contract entered into by the defendant, the first mortgagee; the purchaser having refused to complete, it was held that the defendant was entitled to make the purchaser a party to the action. As the question in the present case between all the parties is one litigation, it is right that it should be tried in one action.

McIntyre, Q.C., and *Moulton*, for Round. This is not a counter-claim, but it is a separate suit arising out of a distinct transaction. The defendants do not claim a joint, separate, or alternative relief; they claim a distinct remedy against the plaintiff and Round, viz., damages to be paid by the plaintiff, and indemnity from Round on a bond to which the plaintiff is not a party. Order XXII., Rules 5 and 6, do not authorize this. In order to enable a defendant to add a third party, there must be a question between himself and the plaintiff along with some other person. If the defendants brought an action against Round, the plaintiff could not be joined as a party. A counter-claim which does not claim relief against the plaintiff also is bad: *Furness* v. *Booth* (2); and here the counter-claim upon the bond does not, and cannot, set up any title to relief as against the plaintiff. From the observations of Mellish, L.J., in *Treleaven* v. *Bray* (3), it is clear that the defendants cannot delay the plaintiff by claiming relief against some other person by whom they allege they ought to be indemnified.

Matthews, Q.C., in reply.

BRAMWELL, L.J. I think that the appeal ought to be allowed. Where a defendant has a good counter-claim, and if he had brought a separate action he could have recovered, I think it reasonable that he should be as well off as if he had been a plaintiff in a cross action. The words of Order XXII., Rule 5, are "where the

(1) 4 Ch. D. 476. (2) 4 Ch. D. 586.
(3) 45 L. J. (Ch.) at p. 114.

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defendant sets up a counter-claim between himself and the plaintiff along with any other person, he shall add to the title of his defence a further title setting forth the names of all persons who, if such counter-claim were to be enforced by cross-action, would be defendants in such cross-action." I at first felt a little difficulty as to the meaning of the words "would be," for primâ facie they seem to indicate that the defendant could only make another person party to the counter-claim who might have been a defendant in an action brought by the defendant against him and the present plaintiff upon a joint contract, but I think the true meaning is that if the defendant could have made the plaintiff and the third party defendants in any action, the counter-claim is valid. Could the defendants have brought an action against Round and the plaintiff? I am of opinion they could. The relief that the defendants claim against Round is indemnity for the breach by the plaintiff of his contract, to the extent of 200*l.*, but the relief that is sought is on a contract between the defendants and Round, it is not a joint, but a several, liability. If the obligation, however, had been created between the parties in one instrument, limiting Round's liability to 200*l.*, in that case it would have been a joint contract, and I think that the substance of the actual contract between the parties is the same. Unless we hold that the amount sought to be recovered is an independent liability arising on a different contract, the present defendants would be entitled to join Round as a defendant in an action. As they can do that, I think that Round can be joined with the plaintiff in the counter-claim.

BRETT, L.J. I am of the same opinion and found my decision on Order XXII, Rule 5. The words are that "where the defendant by his defence sets up any counter-claim which raises questions between himself and the plaintiff, along with any other person or persons," but the rule does not provide that the "questions" shall arise out of the cause of action mentioned in the statement of claim. The meaning of the order and rule is if the questions raised in the counter-claim would have formed a good cause of action in a cross action, brought by the actual defendant against

the actual plaintiff and some other person, that third person may be made a party to the existing suit by counter-claim. The principle is, that wherever, by reason of some legal or equitable relation between the parties, the question in the case between the defendant and the plaintiff, which is, if true, a good counter-claim against the plaintiff, may also be a question between the defendant and a third person; although such third person could not be a party to the plaintiff's original claim, he may be joined to the existing suit by counter-claim. By the defendants' counter-claim a question is raised between the defendants and the plaintiff which, if true, gives a good counter-claim to the defendants against the plaintiff; but that question gives rise to a further question which, by reason of the relation of the plaintiff and the defendants and Round, might be raised in an action by the defendants against the plaintiff and Round. It is true that the defendants' claim against Round is founded upon a deed between them to which the plaintiff was not a party; but there is an equitable relation between all the parties, because Round by that deed became a surety for the performance by the plaintiff of the contract with the defendants, and the same question of liability arises to the defendants as arises against the plaintiff and Round. But Round cannot be made liable to the defendants unless the plaintiff has been guilty of some breach of the contract. The relation, I think, is intimate enough to admit of Round being made a party to this suit. I venture to think that where the litigation obviously involves questions between the plaintiff and the defendant and other parties, we ought to give a liberal interpretation to these orders and rules, which were, no doubt, framed with the intention of settling in one litigation all questions arising out of the subject-matter of the dispute.

COTTON, L.J. I think the defendants are entitled to set up the counter-claim and that the appeal should be allowed. Does this counterclaim raise a question between the plaintiff and the defendants and Round? The objection is that the bond is a separate bond by Round and not a joint bond by the plaintiff and Round, but that objection cannot be allowed to prevail; it is one litigation

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respecting the same matter. The counter-claim need not be co-extensive with the claim, and I think the case is within Order XXII, Rule 5, and it is very advisable to settle all questions in one action. In *Furness* v. *Booth* (1) the question was whether or no there was any counter-claim, and it was decided there was no counter-claim; here the question is whether there is a good counter-claim. I think clearly that there is.

Appeal allowed.

Solicitors for Round: *Duignan & Smiles.*

Solicitors for defendants: *Norris, Allen, & Carter, for J. P. Gardner, Cannock.*

(1) 4 Ch. D. 586.

PATSCHEIDER *v.* THE GREAT WESTERN RAILWAY COMPANY. 1878 *Jan.* 21.

Carrier—Railway Company—Passenger's Luggage—Delivery to Passenger—Termination of Company's Risk.

It is the duty of a railway company with regard to the luggage of a passenger, which travels by the same train with him but not under his control, when it has reached its destination, to have it ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can receive it; and the liability of the company does not cease until a reasonable time has been allowed to the owner to do so.

THIS was an action to recover the value of a box and its contents, lost through the alleged negligence of the defendants. At the trial before Denman, J., at the Easter Sittings in Middlesex for 1877, it appeared that the plaintiff, a lady's maid, was travelling with her mistress on the defendants' line from Malvern to Paddington. On arrival at the latter station the plaintiff saw her box taken from the luggage-van and placed on the platform with other luggage of her mistress. She then went for the porter of the hotel to take the luggage to the hotel, but when she subsequently arrived there she could not find the box among the luggage which the hotel porter had brought. The evidence, as to what had happened with respect to the box after it was taken from the van and placed on the platform, was conflicting; but the jury found that there had been no delivery to the plaintiff. They also found that the box had been lost by the negligence of the defendants, and that there had been no contributory negligence on the part of the plaintiff; and they returned a verdict for 30*l.*

A rule was subsequently obtained for a new trial, on the ground that the learned judge had not directed the jury what was in law sufficient to constitute delivery by a carrier, or what was the duty of the company at the end of a journey; and also on the ground that the verdict was against the weight of evidence.

Hume Williams, and *J. F. Torr*, shewed cause. They referred to *Butcher* v. *London and South Western Ry. Co.* (1), and *Richards* v. *London, Brighton, and South Coast Ry. Co.* (2).

(1) 16 C. B. 13; 24 L. J. (C.P.) 137. (2) 7 C. B. 839; 18 L. J. (C.P.) 251.

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J. Digby, and *Darling*, for the defendants, referred to *Shepherd* v. *Bristol and Exeter Ry. Co.* (1)

CLEASBY, B. It appears to me we ought not to make the rule absolute for a new trial in this case upon the ground either of misdirection or of the verdict being against the weight of evidence. The passage read by Mr. Digby from Redfield on Carriers appears to me to put the question in a very intelligible and convenient form. It is this (2): "It is the duty of a railway company, in regard to the baggage of a passenger which has reached its destination, to have the baggage ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can call and receive it, and it is the owner's duty to call for and remove it within a reasonable time."

Now, there might be a case in which the question turned upon the second paragraph or sentence, "It is the owner's duty to call for and remove it within a reasonable time." There might be such a breach of duty on the part of the owner as to disentitle him, but I do not think that question arises in this case, for I think until the passenger has the opportunity of taking away his luggage it remains in the custody of the company. I should say the sole question in this case was whether the box was taken before the plaintiff had the opportunity of claiming it and taking it away. As far as regards any question of law to be laid down upon the subject, I should have no hesitation in saying that the mere throwing the box out upon the platform, mixed, as it might be, with other luggage, was not a delivery or a discharge of the defendants' obligation. It can hardly be contended that could be so; but it must be placed there and kept until the passenger has the opportunity of calling for it and receiving it. Then, if placing it upon the platform is not enough, was it taken away before anything had taken place in the way of delivery? If the matter had been put in that way to the jury, and they had found that it was taken before any delivery except the putting it upon the platform, it is impossible to say there was not evidence to justify them in coming to that conclusion; indeed it is plain the only conclusion one can come to is that the loss did happen in that way.

(1) Law Rep. 3 Ex. 189. (2) Redfield on Carriers, at p. 61.

In dealing with the question whether that was properly left to the jury, there is no doubt it was left to the jury generally. If one could see that what was left to the jury was, simply, whether the particular circumstances amounted to a delivery, I should have had a good deal of difficulty in saying that was the proper way of leaving it to the jury, but I take it the question left was not whether the circumstances amounted to a delivery, but what were the circumstances of the case, how it happened, and in that way it seems to me, coupled with the proper observations, which appear to have been made, the question was brought before the jury as to the time when this was taken away, when it ceased to be in the custody of the company. The question whether there was negligence on the part of the defendants is not really the question in the case, but if we find the conclusion the jury arrived at was that the box was taken away by reason of the negligence of the defendants, it follows from that they thought it was taken away while in the custody of the defendants, which is the question in the cause. It is rather an indirect way of asking it, but it appears to me to be the same question.

There is another question which the learned judge thought it prudent to leave to the jury, whether there was contributory negligence on the part of the plaintiff; but it appears to me that question is not properly raised in this case.

HAWKINS, J. The plaintiff's box came into the defendants' possession under circumstances that imposed upon them the duty to convey it to its destination, and deliver it to the plaintiff. That they conveyed it is clear, because the plaintiff saw it taken out of the van and put upon the platform. The remaining question is whether the defendants delivered the box to the plaintiff. Upon that part of the case I am clearly of opinion that upon this evidence, the jury having found the box was not delivered, we ought not to disturb the verdict. [The learned judge then dealt with the facts of the case, and continued:—]

There was one point discussed in the course of the argument about which I should like to say a word. The company are bound to deliver at the end of the journey, but that must be subject to this, that the plaintiff, the passenger, is ready and willing to

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receive within a reasonable time. I quite understand, if a reasonable time elapses for a passenger to take his luggage and he does not take it, he cannot complain and say the railway company are to be responsible if he does not take it within a reasonable time. If he does not take it away in a reasonable time the liability of the company as carriers is at an end. It is not necessary to determine that here, because I cannot see a particle of evidence suggesting that the plaintiff was not ready within a reasonable time to receive her box if that box had been there. I am of opinion, therefore, this rule should be discharged. I would add with reference to the case of *Richards* v. *London, Brighton, and South Coast Ry. Co.* (1), that Mr. Justice Williams says: "I express no opinion whether or not the defendants could be compelled to do more than deliver the luggage on the platform, but if the company chooses to provide a more convenient mode of delivering luggage to passengers, by employing porters to carry it across the platform to the vehicle by which it is to be taken away, I think their liability as carriers continues until the porters have discharged their duty." Here the defendants undertake to deliver the luggage on the platform, and they must keep it safely until a reasonable time has elapsed.

Rule discharged.

Solicitors for plaintiff: *Gorton & De Fivas.*
Solicitor for defendants: *R. R. Nelson.*

(1) 7 C. B. 839, at p. 860.

[IN THE COURT OF APPEAL.]

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Jan. 17.

BAKER *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF PORTSMOUTH, ACTING AS URBAN SANITARY AUTHORITY.

Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 34—*Words—Construction of New Streets—Bye-law—Power to pull down Work done in Contravention of Bye-laws.*

By the Local Government Act, 1858, s. 34, power is given to every local board to make bye-laws with respect to the level, width, and construction of new streets, the structure of walls of new buildings, the sufficiency of space about buildings, and the drainage of buildings, &c.; and they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power to the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws:—

Held, affirming the judgment of the Exchequer Division, that the power to make provision as to removing, altering, or pulling down buildings was not confined to bye-laws relating to structure, but might be extended to and incorporated in bye-laws as to notice and deposit of plans.

APPEAL from the judgment of the Exchequer Division, in favour of the defendants, on demurrer to a statement of defence. (1)

Jan. 16. *Kingdon, Q.C.*, and *Petheram*, for the plaintiff.

Jan. 17. *Charles, Q.C.*, and *A. L. Smith*, for the defendants.

The arguments and the cases cited were the same as in the Court below.

Jan. 17. BRAMWELL, L.J. I am of opinion that the judgment must be affirmed. No doubt great power is given to sanitary authorities, the legislature thinking that it was tolerably certain that they would use those powers with discretion, and not tyrannically. We must, therefore, construe those sections and bye-laws without regard to consequences. I have come to the conclusion that the words of sub-s. 1, "with respect to the level, width, and construction of new streets," include the construction of the buildings, and the buildings themselves and front gardens, or whatever

(1) Ante, p. 4.

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else is at the side of the roadway. I have come to this conclusion not upon any authority, for I cannot see that any authority has any bearing upon the matter, except to shew that the word "street" may have such a meaning, but because it is the right meaning of the words. I think so for many reasons; first, because otherwise there is no power of regulating new buildings in new streets, if the sanitary authority cannot make such regulations under this clause. In the next place, the word "construction" is used, which is not a word which would be used in speaking of a street, as merely meaning a roadway, or a footway, or a carriage-way. The "construction" of a street is not a common expression; we speak generally of the construction of a house, or the laying out of a street; but, further, if we examine the general words after sub-s. 4, we find that "they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings." I think, therefore, sub-s. 1 refers to the buildings on the side of the street, as well as to the roadway. If this is so, I think the sanitary authority were right to say that until the street is approved of by them as a street, or I may say as a foot and carriage way, no building by the side of it should be erected. I must remark here, that the word "construct" in bye-law 3 does not refer to houses; it refers to streets, but whatever may be the language of the bye-law, it is not to be taken as a guide to interpret the statute. Nobody would suppose that streets would be half a century in the course of construction; we must treat the matter reasonably, and I can understand the sanitary authority saying, "Until we see what the street is, what its capacity is, and what it will be fit for, we direct that no buildings shall be erected upon it;" and I also think that there is another reason, namely, until this street is properly laid down with the drains and sewers and other necessary things, it would be inconvenient that any buildings should be erected upon it, or that it should be used for any purpose that would be prejudicial to health. I think, therefore, the sanitary authority had power to make that bye-law, and that alone would justify what they have done, for it must be admitted that buildings had been erected in contravention of the bye-law.

As to the other matter, the argument addressed to us as I understood was this: If a bye-law is made with a view to accomplish any of the objects specified in the four sub-sections, and then another bye-law is made to enforce the observance of the first bye-law, then those houses cannot be pulled down if they are built in contravention of the auxiliary bye-law; they can only be pulled down when built in contravention of the direct and first bye-law. I doubt whether such an argument has any application to the present case, because this statute contemplates one bye-law, that is, a bye-law under which the sanitary authority may arrange as to the deposit of plans, and as to their power to pull down and remove buildings built in contravention of the bye-law, and in my opinion these bye-laws form one bye-law, such as is contemplated by the statute. I think they have a right to say, "no one shall build until he has deposited plans, and if he does, his house shall be pulled down." For these reasons, the judgment of the Exchequer Division should be affirmed.

BRETT, L.J. I am of the same opinion. The defendants justify pulling down the houses in question by reason of a contravention of two bye-laws, the 3rd and 32nd. If either of the bye-laws, 3 or 32, be good, and if there has been a contravention of either of them, then that which has been done, by reason of bye-law 37, which is made to enforce the bye-laws, can be justified. The question which we have to decide is whether either bye-law 3 or bye-law 32 is good, and whether bye-law 37 which imposes the penalty or gives the right is also good; and, in order to determine this, we must ascertain the construction of the sub-sections of sect. 34 of the statute, and I am of opinion that the phrase "new streets" in sub-section 1 of sect. 34 includes the buildings by the side of a roadway as well as the roadway itself.

In the former Acts of Parliament there were specific enactments with regard to houses for sanitary purposes, which are repealed, and in place of them a power is given by the Act of 1858 to make bye-laws. That seems to me to shew that the legislature did not intend to take away any power of dealing with houses which already existed in the sections of the former Act, but to give a further power to deal with them, and they gave a defined power by

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statute to make bye-laws, not upon particular points, but in respect to particular points, which is a much larger phrase.

In so dealing with the matter, did the legislature intend by the term "new street" to exclude houses with regard to which there had been statutable notice formerly? I cannot think they did, and if there is nothing in the Act to shew that "new street" excludes houses, that then it ought to comprise houses. So far from thinking the phrase "new street" shuts out houses, I am inclined to think that the ordinary meaning of the word "street" does include the houses as well as the roadway. I incline to agree with what was said by Lord Chelmsford in *Galloway* v. *Mayor, &c., of London* (1) with regard to the ordinary meaning of the word "street"—that it does not mean the mere roadway, but a thoroughfare with houses on both sides; but whether that be so or not, we have here this distinction in phraseology. The legislature, when speaking of a street, speak of construction, and when they speak of a roadway, they use the words "lay out." I do not, however, say that "construction" in sub-s. 1 does not include the construction of the roadway. I think it does, but it is a word which is also applicable to the erection of buildings. It is a word which is applicable to the making of the roadway and of the buildings. Therefore, I think it is meant to apply to both; at all events there is nothing to exclude the view that the phrase "new streets" comprises buildings. No bye-law similar to the 3rd bye-law here could be good unless the words "new streets" in the 1st sub-s. of sect. 34 includes the buildings. I think that is very strong to shew that it does include the buildings as well as streets. If it does include buildings by the side of the new streets as well as the roadway, then the local board are entitled to make bye-laws with respect to the construction of the buildings by the side of the new street. Have they made such bye-laws? Now the third bye-law seems to me obviously one with respect to construction. It is that no building shall be erected until the street has been constructed to the approval of the local board. That seems to me to be a regulation made with respect to the construction of the buildings by the side of the new street. With regard to the bye-law 32, it has been argued that at all events that is not

(1) Law Rep. 1 H. L. C. at p. 55.

a bye-law made under any of the previous sub-sections, but is only made under the more general part of the sect. 34, and it was argued upon that, that although bye-law 32 might be good, yet it was not a bye-law made under any of the four sub-sections, but under the general part, and that bye-law 37 would be a bye-law not to enforce a bye-law made under any one of the four sub-sections, but a bye-law to enforce a bye-law made under the general part of the section. That is an argument which cannot prevail, for when we look at the general part of s. 34, it carries what is done under that general part into the sub-ss. 1, 2, 3, and 4. So that after those sub-ss. 1, 2, 3, and 4, which enable the board to make bye-laws, comes this: "And they may further provide for the observance of the same"—that is, for the bye-laws made—"by enacting therein"—that is, in those bye-laws which are made under the four sub-sections—"such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power of the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws."

Now it seems to me that the moment they have made bye-laws under the four first sub-sections properly, they may enact in those bye-laws the other provisions, and if they do, those provisions become part of those bye-laws. Now among those provisions they may enact provisions with regard to notice, the giving of notices, and the depositing of plans. If they do enact that, it is in the bye-laws made under the first four sub-sections, and it is part of those bye-laws, and may be enforced. It seems to me that bye-law 32 does enact, and all these bye-laws, although they are numbered, form one bye-law; and in the bye-laws they have properly made under sub-s. 1, as it seems to me, they have enacted in those bye-laws provisions with regard to giving notice; they have done that in bye-law 32. Bye-law 32, therefore, is as much a bye-law under sub-s. 1 as is bye-law 3. If that be so, then bye-law 37 gives them power to pull down the houses for contravention of the bye-law 3 and bye-law 32, both or either of them, both of which are properly made under sub-s. 1 of s. 34 of the Act of Parliament. For these reasons I think the board were justified in pulling down these

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houses. Whether they executed their powers harshly or not must depend upon other circumstances, with which we have nothing to do.

COTTON, L.J. I have no doubt that the power which the sanitary authority of Portsmouth has claimed to exercise is a very large power; it is to pull down a man's house after he has been at considerable expense in building it, and we ought to be satisfied that the legislature has given them such power. No doubt when they gave such power to sanitary authorities, the legislature thought they would exercise it judiciously for the general benefit of the public, and we must assume that has been done here. The only question for us is whether or no the statute does enable the defendants to say that this power has been given to them. I confess I had some doubt about it, but the argument has pretty well cleared away my doubt. If, however, it turned upon this question, whether or no, assuming the bye-law was not one made in respect of the matters referred to in the four sub-sections of the 34th section, I should desire further time for consideration, for I think there is a great deal in Mr. Petheram's argument; but I do not think it necessary to express any opinion upon that point, because my opinion is, that the third bye-law is a bye-law made with respect to the matters mentioned in the first sub-section of the 34th section of the Act.

Now, the question is really what is the meaning in the statute of these words, "with respect to the level, width and construction of new streets." I say the question is what is the meaning of that in the section of the statute? and then, is or is not this third bye-law a bye-law made with respect to the construction of new streets? Now, no doubt the word "street" is very ambiguous. What it means must be determined by looking at the context, and by seeing for what purpose the statute was passed, and with reference to what the new street is to be made. We must construe the statute, and then see whether whatever is done under the bye-law is within the power given by the statute. Now, looking at the words, "level and width," primâ facie they refer, no doubt, to the roadway. Then we have the construction of streets, and we must consider what is meant there by the word "street." Is it confined to the roadway, or does it not also include that which in one

sense is no doubt part of the street—the houses on both sides—just as a person might say he lives in a street, though in fact he lives in a house in a street.

Now, in dealing with this matter we are dealing with a power given to a body to whom the legislature has given the general control of the borough of Portsmouth, for the purpose not only of enabling them to direct that there shall be proper roadways—streets, but for the purpose of enabling them to control matters in reference to houses there, and in s. 35 (1) of the Act of Parliament there is an express power given to them to lay down what ought to be the line of buildings erected in those streets, if old buildings are pulled down and new ones put up. Now, that shews their powers are not intended to be confined to those matters in the construction of houses which are referred to in sub-sections 2, 3, and 4, which refer to the stability of structures, the sufficiency of air, and the general sanitary arrangements. They have power to put any limit upon the matter referred to in those three sub-sections as to the construction, the size, or the height of buildings in new streets. I think the fair meaning of the word "construction" of new streets in that first sub-section is not confined to the mere making of the streets, the mode in which the metalling is to be done and such things, but "the construction of new streets" surely means the making not only of the roadway, but all matters relating to the building of the houses which border on the street, and which in one sense are called part of the street. A construction of a new street must mean all that refers to the making of the roadway, and all that applies to the building of those houses which are in the street. The defendants have done nothing in excess of that bye-law in exercising their power and pulling down these houses. I think what they have done they were justified in doing.

Judgment affirmed.

Solicitors for plaintiff: *Saunders, Hawksford, & Bennett.*
Solicitor for defendants: *J. Howard, Portsmouth.*

(1) By 21 & 22 Vict. c. 98, s.35, when any house or building has been taken down in order to be rebuilt or altered, the local board may prescribe the line in which any house or building to be hereafter built shall be erected, and the same shall be erected in accordance therewith. . . .

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Feb. 18.

[IN THE COURT OF APPEAL.]

MIRABITA *v.* THE IMPERIAL OTTOMAN BANK.

Contract—Sale of unascertained Goods—Goods, Passing of Property in—Bill of Lading, Goods deliverable to Order.

10 Ch.D.589
11 Ch.D.363

P. shipped 600 tons of umber upon a vessel chartered for the plaintiff. The bills of lading made the umber deliverable to the order of P. or assigns. The plaintiff insured the umber. A bill of exchange drawn by P. on the plaintiff which had been discounted by the defendants' bank, to whom the bills of lading had been transferred, having been refused acceptance, a second bill was drawn by P. to the order of C. on the plaintiff, and was given to the defendants in exchange for the first bill, upon the terms that the plaintiff should accept and pay the second bill against the delivery of the bill of lading. The umber and the bill of exchange reached their destination at the same time, but the plaintiff declined to accept the bill. The umber was, therefore, entered at the Custom House in the defendants' name. Subsequently the plaintiff tendered the amount of the bill of exchange and demanded the bill of lading, but the defendants refused to give up the bill of lading; the plaintiff offered a guarantee for the freight, which offer was not accepted by the defendants, and they sold the cargo:—

Held, in an action by the plaintiff for the value of the umber so sold by the defendants, that the property in the umber passed to the plaintiff, and that, therefore, the plaintiff was entitled to recover.

APPEAL from the judgment of the Exchequer Division, in favour of the plaintiff on a special case stated by an arbitrator. (1)

The plaintiff is a merchant carrying on business at Malta and Constantinople. The defendants are a banking company incorporated by a firman of the Sultan, and carrying on business at Constantinople with agencies at London and Larnaca.

On the 26th of June, 1873, a contract was made between the plaintiff and Phatsea & Pappa, a firm at Larnaca, for certain umber to be sold to and shipped for the plaintiff by Phatsea & Pappa at Larnaca.

On the 7th of July, 1873, the plaintiff wrote to Phatsea & Pappa stating that he would send ships on receiving advice of the quantity of umber ready for shipment, and also that the bills of lading must state that Phatsea & Pappa shipped the umber "by order and on account of the plaintiff."

On the 26th of August, 1873, Phatsea & Pappa had 600 tons of

(1) The action was commenced before the Judicature Acts came into operation.

umber ready for delivery and shipment under the contract, and they chartered by order of the plaintiff and for his account a British ship, the *Princess of Wales*, then lying at Alexandria, to carry a cargo of such umber from Larnaca to London. The plaintiff approved of the charterparty. The *Princess of Wales* proceeded to Larnaca, where she took on board a cargo of 600 tons of umber. About the 9th of October the plaintiff sent 150*l.* to Phatsea & Pappa for ship's advances, of which sum 70*l.* was paid to the master.

On the 9th of October the master signed four bills of lading for the cargo, which stated the goods to be shipped by Phatsea & Pappa, and to be delivered "to order or assigns." The bills of lading were given to Phatsea & Pappa.

On the 10th of October the *Princess of Wales* sailed from Larnaca, and on the 14th of October Phatsea & Pappa informed the plaintiff by telegram that the vessel had left with 600 tons on the 10th instant; that they would shortly receive bills of lading and draft at sixty days, and requesting them to insure the cargo. The plaintiff communicated with his son, F. Mirabita, trading in London as Mirabita Brothers, and through him effected an insurance on the cargo.

Phatsea & Pappa drew a bill of exchange for 280 Turkish liras on the plaintiff, and indorsed and handed it with the bills of lading to Corkji, from whom they had bought the umber which formed the cargo. Phatsea & Pappa had paid Corkji for the umber, and they handed them the bill of exchange by way of accommodation, to enable him to obtain an advance from the defendants and in anticipation of future supplies of umber.

Corkji discounted the bill of exchange at the Larnaca agency of the defendants' bank, and with the bill of exchange handed them the bills of lading, saying that they were to be sent to Constantinople, and given up to the plaintiff on payment by him of the bill of exchange at maturity.

The Larnaca agency forwarded the bill of exchange and bills of lading to their bank at Constantinople, Pappa having come to Constantinople and handed to the plaintiff the charterparty and invoice of the cargo, which stated that the same was "shipped by order and on account of the plaintiff." The defendants' bank at

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Constantinople presented the bill of exchange to the plaintiff for acceptance, but he declined to accept without receiving the bills of lading. The bill of exchange and the bills of lading were then returned to the Larnaca agency. The plaintiff afterwards offered to the defendants' bank at Constantinople to pay the bill of exchange before maturity on receipt of the bills of lading, but in consequence of the documents having been returned to Larnaca this offer could not be accepted.

It was then arranged between the plaintiff and Pappa that a new bill of exchange for 254*l.* 11*s.* should be drawn by Phatsea & Pappa to the order of Corkji on Mirabita Brothers in London at two months' date, which should be substituted for the former bill for 280 Turkish liras, and notice of the agreement was given to the defendants' bank at Constantinople.

A new bill of exchange, dated the 9th of October, 1873, was, in accordance with the terms so agreed, drawn by Phatsea & Pappa and sent by them to Corkji, who handed it to the Larnaca agency, saying that it was to be sent with the bills of lading to London, where Mirabita Brothers would be ready to accept and pay the bill of exchange at maturity against delivery of bills of lading. The Larnaca agency accordingly gave up the first bill of exchange, and on the 20th of November, 1873, forwarded the bill for 254*l.* 11*s.* to their agency in London, and directed them "to give up the bills of lading on payment of the inclosed bill of exchange."

At the time of making the agreement with the plaintiff for the drawing of the bill of exchange for 254*l.* 11*s.*, as already mentioned, it was doubtful whether the bills of lading would reach England before the arrival of the ship. Pappa thereupon gave the plaintiff a letter, addressed to the master of the *Princess of Wales*, to be used in case the ship should arrive in England before the bills of lading, which letter purported to authorize the master, if the bills of lading had not come to hand, to deliver the cargo to the plaintiff.

On the 3rd of December the *Princess of Wales* reached Gravesend, and was ordered to the Millwall Docks by F. Mirabita.

On the same day the bill of exchange for 254*l.* 11*s.*, together with the bills of lading, was delivered by post, and in the course

of the day was left at the office of Mirabita Brothers, with the following note attached: "Bill of lading for Terra umber, weighing 600 tons, per *Princess of Wales*, to be given up against the payment of attached draft, 254*l.* 11s., on Mirabita Brothers."

F. Mirabita returned the bill of exchange to the defendants' London agency, stating that he was ready to pay the bill at maturity, but he did not then accept it.

On the 8th of December the defendants' London agency gave orders to the ship's brokers to enter cargo in the name of the bank, and on the 12th the cargo was entered at the Custom House in the defendants' name; but the defendants took no other steps towards taking possession of the cargo till after the 20th of December.

On the 12th of December F. Mirabita called on the defendants, and offered to pay the bill and receive the bills of lading. The defendants' manager refused to accept payment, alleging that they had taken possession of the cargo and thereby had made themselves liable for freight. They had done nothing to take possession of the cargo or to make them liable for freight.

On the 18th of December F. Mirabita again offered to pay the bill of exchange and to give a guarantee for the freight. After some further negotiation the defendants landed the cargo, and after heavy charges for demurrage, landing, and other expenses had been incurred, sold the cargo in bulk, without any authority from the plaintiff or F. Mirabita, for a sum which was not sufficient to pay the amount of the bill of exchange, freight, and expenses; the cargo was worth more than the amount of the bill of exchange, freight, and expenses, and if the plaintiff had obtained possession of it he would have made a profit therefrom.

So far as it was a question for the jury, the arbitrator found as a fact that it was the intention of Phatsea & Pappa and of the plaintiff that the property in the cargo of umber should pass to the plaintiff upon its shipment on board the *Princess of Wales*, subject to a lien on the same for payment of the price; and their intention that the property in the cargo should be vested in the plaintiff continued from the time of shipment until the arrival of the ship in England.

The Court is to be at liberty to draw inferences of fact, and to

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disregard the above finding, if a jury would not have been justified in coming to such a conclusion from the facts above stated. The question was whether the plaintiff is entitled to recover damages from the defendants for their dealing with the cargo as above mentioned.

Jan. 17. *Matthews, Q.C.*, and *Arthur Wilson*, for the defendants, contended that the umber not being specific and the vendors having on shipment of it taken the bill of lading to their own order, the property in the umber did not pass to the plaintiff, and that therefore he could not maintain the action. They cited or relied on the following authorities: *Wait* v. *Baker* (1); *Turner* v. *Trustees of the Liverpool Docks* (2); *Van Casteel* v. *Booker* (3); *Ellershaw* v. *Magniac* (4); *Shepherd* v. *Harrison* (5); *Ogg* v. *Shuter* (6); *Gabarron* v. *Kreeft* (7); and *Jenkyns* v. *Brown.* (8)

Jan. 22. *M. White, Q.C.*, and *Archibald*, for the plaintiff, cited Benjamin on Sales, bk. 2, ch. 5, p. 265 (2nd ed.); *Browne* v. *Hare* (9); *Coggs* v. *Bernard* (10); *Ratcliff* v. *Davies* (11); *Van Casteel* v. *Booker* (3); *Wood* v. *Bell* (12); and *Joyce* v. *Swan.* (13)

Arthur Wilson was heard in reply.

Cur. adv. vult.

Feb. 18. The following judgments were delivered:—

BRAMWELL, L.J. This case has been argued on the footing that the law of England or a like law is applicable, and we must so deal with it. We must treat as the governing bargain between the plaintiff and Phatsea & Co., the one made at the time it was arranged that the payment should be made by a bill at two months, and that the vendees should not be entitled to the 600 tons of umber, or bills of lading of them, until payment of the bill of exchange. No question arises as to the defendants' rights; for it was admitted, and properly admitted, that the defendants

(1) 2 Ex. 1.
(2) 6 Ex. 543; 20 L. J. (Ex.) 393.
(3) 2 Ex. 691; 18 L. J. (Ex.) 9.
(4) 6 Ex. 570 n.
(5) Law Rep. 5 H. L. 116.
(6) 1 C. P. D. 47.
(7) Law Rep. 10 Ex. 274.
(8) 14 Q. B. 496.
(9) 4 H. & N. 822; 29 L. J. (Ex.) 6.
(10) 1 Sm. L. C. 4th Ed. p. 171, citing *Kemp* v. *Westbrook*, 1 Ves. 278.
(11) 2 Cro. Jac. 244.
(12) 6 E. & B. 355.
(13) 17 C. B. (N.S.) 84.

did wrong in refusing the amount of the bill, and selling the umber. On the other hand, there is no contract between the plaintiff and the defendants. So that in the result the case is reduced to this: When the defendants tortiously disposed of the umber, had the plaintiff such a property therein, or right thereto, as to entitle him to maintain this action? It is argued that he had not, and the reason given is, that as the umber was not specific and ascertained, and as on shipment the shippers took a bill of lading to order, and gave an interest in it to Corkji, who transferred it to the defendants, no property passed; and for this a long series of authorities, beginning with *Wait* v. *Baker* (1) and ending with *Ogg* v. *Shuter* (2), is cited. It is almost superfluous to say that by these authorities I am bound, that I pay them unlimited respect, and I may add I do so the more readily as I think the rule they establish is a beneficial one. But what is that rule? It is somewhat variously expressed as being either that the property remains in the shipper, or that he has a jus disponendi. Undoubtedly he has a property or power which enables him to confer a title on a pledgee or vendee, though in breach of his contract with the vendor. This appears from *Wait* v. *Baker* (1); *Gabarron* v. *Kreeft* (3); and to some extent from *Ellershaw* v. *Magniac* (4). In the first case, Parke, B., expressly says that the vendee Baker could under the circumstances maintain an action against Lethbridge for having sold the barley to Wait. This property or power exists then; and therefore if the vendors of the umber had sold it to the defendants this action would not be maintainable. But in that case the defendants would have acquired a right, while, as I have said, it is admitted that no right in them can be relied on. I think it is not necessary to inquire whether what the shipper possesses is a property, strictly so called, in the goods, or a jus disponendi, because I think, whichever it is, the result must be the same, for the following reasons. That the vendee has an interest in the specific goods as soon as they are shipped is plain. By the contract they are at his risk. If lost or damaged, he must bear the loss. If specially good, and above the average quality which the seller was bound to deliver, the benefit is the vendee's.

(1) 2 Ex. 1.
(2) 1 C. P. D. 47.
(3) Law Rep. 10 Ex. 274.
(4) 6 Ex. 570.

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If he pays the price, and the vendor receives it, not having transferred the property, nor created any right over it in another, the property vests. It is found in this case that as far as intention went the property was to be in the plaintiff on shipment. If the plaintiff had paid, and the defendants had accepted the amount of the bill of exchange, it cannot be doubted that the property would have vested in the plaintiff. Why? Not by any delivery. None might have been made; the defendants might have wrongfully withheld the bills of lading. The property would have vested by virtue of the original contract of sale. It follows that it vested on tender of the price, and that whether the vendor's right was a right of property or a jus disponendi; for whichever it was it was their intention that it should cease on the plaintiff's paying the price, and therefore it would cease unless meanwhile some title had been conferred on a third person to something more than the price. This, though wrongful as regards the plaintiff, would have been valid. But no such title exists here. There is nothing in the authorities inconsistent with this. The only case that may be thought to seem so is *Wait* v. *Baker* (1), where, though the vendee tendered the price, he was held to have acquired no property. But it is manifest that in that case the vendor originally took the bill of lading to order, and kept it in his possession, to deal with as he thought fit, and never intended that the property should pass until he handed the bill of lading to the vendee on such terms as he choose to exact. Parke, B., says: "There is no pretence for saying that Lethbridge agreed that the property should pass." "There was nothing that amounted to an appropriation, in the sense of that term, which alone would pass the property." "There was no agreement between the two parties that that specific cargo should become the property of the defendant," the vendee. Here all the evidence shews that there was such an agreement. The arbitrator says it existed in fact at the time of shipment, but the subsequent conduct of both parties shews it. What seems decisive is this: the plaintiff must have a right against some one; has he any against Phatsea? Now Phatsea has done nothing that he had no right to do, and he has done everything he was bound to do, treating the altered agreement as governing.

(1) 2 Ex. 1.

No action therefore would lie against him. It must then be the defendants who are in the wrong. I think they are, that the property was to pass on payment, and consequently on tender of payment, of the bill of exchange; that the bill of lading was handed to the Larnaca Bank to be delivered to the plaintiff on payment of the bill of exchange; that therefore the plaintiff can maintain this action, and the judgment should be affirmed. I would add that I agree with the reasoning of my brother Cleasby in the Court below; and I would further remark that I believe this is a question which would not have been open to the slightest doubt if the action had been brought after the coming into operation of the Judicature Acts. Cotton, L.J., has favoured me with a perusal of his judgment, and I entirely agree with it.

COTTON, L.J. In this case the vendors on shipping the goods, the subject of the contract, took a bill of lading requiring the delivery of the goods to be to their order, and dealt with that bill of lading in this way in order to secure payment of the bill of exchange which they then drew on the plaintiff. The bill of exchange was discounted with the defendants, and the bill of lading was transferred to them as security for the payment of the bill of exchange; this bill of exchange having been refused acceptance, a second bill of exchange was drawn and given in lieu of the first bill, upon the terms of the delivery of the bill of lading to the plaintiff upon payment of the second bill of exchange, and in so dealing with the bill of exchange the vendors intended that upon payment, the plaintiff, the purchaser, should obtain the goods, and they agreed, and, as far as they could, transferred to the purchaser their right to insist that on payment of the bill of exchange the bill of lading should be handed over.

I mention those facts for the purpose of adding this: that the action was instituted before the passing of the Judicature Acts, and therefore it is simply to be dealt with as a legal question; and we cannot inquire here how far the plaintiff has the right in equity to insist that he occupies the same position as the vendors, and to insist that as against the pledgee of the bill of lading the plaintiff, as transferee of the right, has a good equitable title, even if he has not a legal title. In fact in the present case it simply

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turns on this question, whether the property in the goods in question has, under the circumstances, passed to the plaintiff.

Now I quite agree with the judgment of Bramwell, L.J., but as several cases were cited in the argument which it was contended were adverse to the ground of our decision, I think it better to state what I consider to be the principle of those decisions, and to point out how far that principle is applicable to such cases as this: Under a contract for sale of chattels not specific the property does not pass to the purchaser unless there is afterwards an appropriation of the specific chattels to pass under the contract, that is, unless both parties agree as to the specific chattels in which the property is to pass, and nothing remains to be done in order to pass it. In the case of such a contract the delivery by the vendor to a common carrier, or (unless the effect of the shipment is restricted by the terms of the bill of lading) shipment on board a ship of, or chartered for, the purchaser, is an appropriation sufficient to pass the property. If, however, the vendor, when shipping the articles which he intends to deliver under the contract, takes the bill of lading to his own order, and does so not as agent or on behalf of the purchaser, but on his own behalf, it is held that he thereby reserves to himself a power of disposing of the property, and that consequently there is no final appropriation, and the property does not on shipment pass to the purchasers. When the vendor on shipment takes the bill of lading to his own order, he has the power of absolutely disposing of the cargo, and may prevent the purchaser from ever asserting any right of property therein; and accordingly in *Wait* v. *Baker* (1), *Ellershaw* v. *Magniac* (2), and *Gabarron* v. *Kreeft* (3), (in each of which cases the vendors had dealt with the bills of lading for their own benefit), the decisions were that the purchaser had no property in the goods, though he had offered to accept bills for or had paid the price. So, if the vendor deals with or claims to retain the bill of lading in order to secure the contract price, as when he sends forward the bill of lading with a bill of exchange attached, with directions that the bill of lading is not to be delivered to the purchaser till acceptance or payment of the bill of exchange, the appropriation is not absolute, but, until acceptance of the draft, or payment, or

(1) 2 Ex. 1. (2) 6 Ex. 570. (3) Law Rep. 10 Ex. 274.

tender of the price, is conditional only, and until such acceptance, or payment, or tender, the property in the goods does not pass to the purchaser; and so it was decided in *Turner* v. *Trustees of Liverpool Docks* (1); *Shepherd* v. *Harrison* (2); *Ogg* v. *Shuter* (3). But if the bill of lading has been dealt with only to secure the contract price, there is neither principle nor authority for holding that in such a case the goods shipped for the purpose of completing the contract do not on payment or tender by the purchaser of the contract price vest in him. When this occurs there is a performance of the condition subject to which the appropriation was made, and everything which, according to the intention of the parties, is necessary to transfer the property is done; and in my opinion, under such circumstances, the property does on payment or tender of the price pass to the purchaser.

Apply these principles to the present case. Pappa did not attempt to make use of the power of disposition which he had under the bill of lading for the purpose of entirely withdrawing the cargo from the contract. He dealt with it only for the purpose of securing payment of the price. It is expressly stated in the special case that Mr. Corkji, who acted for Pappa, discounted the said bill of exchange at the agency of the defendants' bank, and with the bill of exchange handed them the bills of lading, saying that they were to be sent to Constantinople and given up to the plaintiff on payment of the bill of exchange at maturity.

Under these circumstances there was an appropriation by the vendors of the cargo subject only to payment of the price. This was tendered, and as it is conceded that the defendants were wrong in claiming anything more, the plaintiff, the purchaser, had done or offered to do all that was incumbent on him to make the appropriation absolute, and the property vested in him.

BRETT, L.J., concurred that the judgment of the Exchequer Division must be affirmed.

Judgment affirmed.

Solicitors for plaintiff: *Stocken & Jupp.*

Solicitor for defendants: *Clements.*

(1) 6 Ex. 543; 20 L. J. (Ex.) 393. (2) Law Rep. 4 Q. B. 196.
(3) 1 C. P. D. 47.

1878
Feb. 28.

[IN THE COURT OF APPEAL.]

BISSICKS *v.* THE BATH COLLIERY COMPANY, LIMITED.
Ex Parte BISSICKS.

Sheriff—Fieri Facias—Poundage—Seizure.

A sheriff's officer in the execution of a warrant of fi. fa. went with another man to the debtor's house, shewed him the warrant and demanded payment, and told him that in default of payment the man must remain in possession, and further proceedings would be taken; the debtor then paid the sum demanded in the warrant, which included poundage and officer's fee:—

Held, that there had been seizure upon the fi. fa., and that the sheriff was entitled to poundage.

Appeal by the plaintiff from the decision of the Exchequer Division, discharging an order calling on the sheriff of Bristol to shew cause why he should not return the sum of 2*l.* 12*s.* received by him for poundage and fees. (1)

The facts are set out in the report of the proceedings before the Exchequer Division, and the only additional circumstance necessary to be mentioned is that, before the sheriff's officer came to the plaintiff's shop, the plaintiff had sent the amount of the costs to London to be paid to the defendants.

Feb. 21. *Meadows White, Q.C.*, for the plaintiff. It must be admitted, after the decision in *Mortimore* v. *Cragg* (2), that the sheriff is entitled to poundage if he recovers by seizure the amount mentioned in the fieri facias, although no sale takes place; but it is contended for the plaintiff that there was no seizure at all. The facts in this case resemble those in *Nash* v. *Dickenson* (3), and *Colls* v. *Coates* (4) shews that unless the sheriff takes possession of the goods of the execution debtor he is not entitled to poundage.

McKellar, for the sheriff.

Cur. adv. vult.

Feb. 28. Bramwell, L.J. I think that, in order to entitle the sheriff to poundage, there must be a seizure. I am aware that

(1) 2 Ex. D. 459.
(2) 3 C. P. D. 216.
(3) Law Rep. 2 C. P. 252.
(4) 11 Ad. & E. 826.

the only result of our holding, that there must be a seizure, will be that a sheriff's officer upon entering a house to execute a fieri facias will say that he seizes everything therein: but we cannot get over the current of authority that there must be a seizure. The question is whether, upon the facts, there was a seizure; the Lord Justice Brett is strongly of opinion that there was a seizure; the Lord Justice Cotton feels some doubt. I also feel some hesitation, but upon the whole I think there was a seizure, for the officer did threaten to leave a man in possession. The appeal will be dismissed.

BRETT, L.J. I agree that there must be a seizure; but upon the facts I think there was a seizure. The sheriff's officer went to the plaintiff's house with a man, he obtained entry into the house, and whilst he was there the plaintiff's goods were under his control; he spoke as if he had made a seizure, and he treated what he was doing as if it was a seizure; and the plaintiff also treated it as a seizure; although he had previously paid the amount of the costs, he paid it again, because he considered it a seizure; and, in ordinary language, he paid the sheriff out. For the reasons which I have given, I think there was a seizure; the proceedings of the officer were treated by both parties as a seizure.

COTTON, L.J. I adhere to the doctrine that there must be a seizure before poundage can be claimed. I have felt some doubt, but on the whole I think there was a seizure; for if the money had not been paid, the officer would have left the man in possession of the plaintiff's goods.

Appeal dismissed.

Solicitors for plaintiff: *Mead & Daubeny.*
Solicitors for sheriff: *Guscott, Wadham, & Daw.*

1878
May 3.

BARNES, Appellant; CHIPP, Respondent.

Adulteration of Food and Drugs—Analysis of Article—Notification to Seller condition precedent to Prosecution—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 12, 14, 20, 21.

9 QBD 175

The Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), enacts, by s. 6, that "no person shall sell to the prejudice of the purchaser any article of food, or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser," under a penalty; and by s. 14, inter alia, that "the person purchasing any article with the intention of submitting the same to analysis, shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst." Sects. 20 and 21 regulate the proceedings for the recovery of penalties before justices in a summary manner.

A police constable, by the direction of the inspector of weights and measures, bought gin from the barmaid of an inn with the intention of submitting it to analysis. He then told her that he was a police constable, and that he had purchased the gin for the purpose of analysis, but did not add "by the public analyst." The inspector afterwards had the gin analysed by the public analyst, and obtained his certificate that it was diluted, and the innkeeper was prosecuted under ss. 20 and 21, and summarily convicted of an offence against s. 6:—

Held, that the notification required by s. 14 was a condition precedent to a prosecution under the Act, and that the conviction must be quashed.

Case stated by justices under 20 & 21 Vict. c. 43.

At a petty sessions holden in the city of Gloucester on the 4th and 11th of January, 1878, an information was heard, which had been preferred by the respondent against the appellant under s. 6 of 38 & 39 Vict. c. 63, for selling to the prejudice of Bowen the purchaser certain food, to wit one half pint of gin, which was not of the nature, substance, and quality demanded by Bowen.

The following facts were proved on the part of the respondent. On the 25th of September, 1877, Bowen, a police constable stationed and residing at Gloucester, but not appointed by the local authority, went by the direction of the respondent, who is inspector of weights and measures for the city of Gloucester, to the appellant's house, known as the Bell Inn, situate in the city, and asked the barmaid to supply him with half a pint of gin, which was supplied to him in a measure, and for which he paid her 10*d*. He then told her that he was a police constable, that he had purchased the gin for the purpose of analysis (but did not add "by the public

analyst"), and that if she liked he would divide it (but did not add "into three parts"), and give her a portion, but she did not require it. He then put it into a bottle, which was labelled "16," corked it, and sealed it with the county seal in the presence of the barmaid, shewed it to her, and asked her to make any mark she liked for the purpose of identification, which she declined to do. He then took the bottle to the police station, and handed it to the respondent in the same state. On the 9th of October, 1877, the respondent took the bottle in the same state, and handed it to Mr. John Horsley, the analyst appointed for the city of Gloucester, who does not reside within two miles of Bowen's residence, but resides at Cheltenham, nine miles from Gloucester. On the same day Horsley analysed a portion (about one-fourth) of the contents of the bottle. It contained seventy-four parts of water and twenty-six parts of spirit, and was fifty under proof, and was diluted. Horsley drew the cork, and with the same cork corked up the remainder of the contents of the bottle (but did not seal it), and locked it up in a cupboard in his laboratory, to which no one but himself had access. He gave his certificate of the result of the analysis to the respondent on the 21st of December, 1877, and the respondent laid the information on the 31st. Horsley sealed the bottle on the 7th of January, 1878, and not before, and delivered it back to the respondent on that day. He never divided the contents of the bottle into two parts, other than by taking out a portion and analysing it.

No evidence was given as to the proper ingredients to be used in the manufacture of gin, nor as to the proper or usual strength at which gin ought to be sold; but it was found as a fact that the gin sold to Bowen was not of the quality demanded by him.

It was contended on the part of the appellant, 1st, that under s. 13 of the Act the person procuring a sample of food for the purpose of being analysed must be a medical officer of health, an inspector of nuisances, an inspector of weights and measures, an inspector of markets, or a police constable appointed by the local authority; and that as Bowen was none of these, the proceedings must fail. 2ndly, that s. 14 had not been complied with, as Bowen did not notify his intention to have the gin analysed by the public analyst, and did not offer to divide it into three parts, and

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that in consequence of such non-compliance the proceedings must fail. 3rdly, that s. 15 had not been complied with, as the analyst did not divide the gin into two parts, and did not seal or fasten up one of those parts and cause it to be delivered to the purchaser, either upon receipt of the sample, or when he supplied his certificate to the purchaser, and that in consequence of such non-compliance the proceedings must fail. 4thly, that the purchaser did not himself take the gin to the analyst, nor send it by post in manner provided by s. 16, and that in consequence of his not doing so the proceedings must fail.

The justices being of opinion—1st, that under s. 12 any person may purchase an article of food and submit it for analysis, and also that an officer, inspector, or constable, under s. 13, is entitled to procure a sample, either himself or by deputy; 2ndly, that s. 14 had been sufficiently complied with by the purchaser stating that he had purchased the gin for the purpose of analysis, and offering to divide it, although he did not mention the public analyst, or offer to divide the gin into three parts; 3rdly, that it was immaterial whether ss. 14 and 15 were strictly complied with or not, compliance with these sections not being a condition precedent to a prosecution under s. 20 (which only requires that the analyst, having analysed the article, shall have given his certificate of the result, from which it appears that an offence has been committed); 4thly, that it is not requisite that the article purchased should either be handed to the analyst by the purchaser himself or forwarded to him by post under s. 16—convicted the appellant of the offence charged, and adjudged him to pay a penalty of 10s. and costs.

The questions of law for the opinion of the Court were—

1st. Whether in proceedings for a penalty under s. 6 (1), the

(1) By s. 6 of the Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63): "No person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l*. . . ."

By s. 12 "any purchaser of an article of food or of a drug" is entitled on payment of a certain sum to have the article analysed by the analyst appointed under the Act, and to receive from him a certificate of the result of his analysis.

By s. 13: "Any medical officer of health, inspector of nuisances, or inspector of weights and measures, or any inspector of a market, or any police constable under the direction and at

person purchasing the article of food must be an officer, inspector, or constable, mentioned in s. 13, or whether he may be one acting

the cost of the local authority appointing such officer, inspector, or constable, or charged with the execution of this Act, may procure any sample of food or drugs, and if he suspect the same to have been sold to him contrary to any provision of this Act shall submit the same to be analysed by the analyst of the district or place for which he acts, or if there be no such analyst then acting for such place to the analyst of another place, and such analyst shall upon receiving payment as is provided in the last section, with all convenient speed analyse the same and give a certificate to such officer wherein he shall specify the result of the analysis."

By s. 14: "The person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst, and shall offer to divide the article into three parts to be then and there separated, and each part to be marked and sealed or fastened up in such manner as its nature will permit, and shall, if required to do so, proceed accordingly, and shall deliver one of the parts to the seller or his agent. He shall afterwards retain one of the said parts for future comparison and submit the third part, if he deems it right to have the article analysed, to the analyst."

By s. 15: "If the seller or his agent do not accept the offer of the purchaser to divide the article purchased in his presence, the analyst receiving the article for analysis shall divide the same into two parts, and shall seal or fasten up one of those parts and shall cause it to be delivered, either upon receipt of the sample or when he supplies his certificate, to the purchaser, who shall retain the same for production in case proceedings shall afterwards be taken in the matter."

Sect. 16 regulates the mode of sending articles to the analyst if he does not reside within two miles of the residence of the person requiring the article to be analysed.

Sect. 17 imposes a penalty on a person exposing any article for sale who refuses to sell the same to any officer, inspector, or constable, &c.

Sect. 20 is headed "Proceedings against offenders," and enacts: "When the analyst, having analysed any article, shall have given his certificate of the result, from which it may appear that an offence against some one of the provisions of this Act has been committed, the person causing the analysis to be made may take proceedings for the recovery of the penalty herein imposed for such offence before any justices in petty sessions assembled, having jurisdiction in the place where the article or drug sold was actually delivered to the purchaser, in a summary manner. . . ."

By s. 21: "At the hearing of the information in such proceeding the production of the certificate of the analyst shall be sufficient evidence of the facts therein stated, unless the defendant shall require that the analyst shall be called as a witness; and the parts of the articles retained by the person who purchased the article shall be produced, and the defendant may, if he think fit, tender himself and his wife to be examined on his behalf, and he or she shall, if he so desire, be examined accordingly."

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under the direction of such officer, inspector, or constable, or any other person.

2nd. Whether on the facts stated, s. 14 was sufficiently complied with.

3rd. Whether on the facts stated, s. 15 was sufficiently complied with.

4th. Whether it is requisite, looking at s. 20, that before a person can be convicted, both ss. 14 and 15 (or one of such sections), must have been strictly complied with.

5th. Whether it is requisite that the article of food purchased should either be taken by the purchaser personally to the public analyst, or forwarded by post to such analyst under s. 16.

If the Court should be of opinion that the conviction was legally and properly made, and the appellant is liable as aforesaid, the conviction to stand, but if the Court should be of opinion otherwise the complaint to be dismissed.

Bosanquet, for the appellant. The appellant does not rely on the point raised by the 1st question. As to the 2nd question, whether compliance with every requirement of ss. 14 and 15 be a condition precedent to a prosecution under the Act, or not, at all events, the purchaser of an article cannot prosecute unless he has, under s. 14, notified "to the seller or his agent selling the article his intention to have the same analysed by the public analyst." The object of this section is that the seller may have full warning of the intention to prosecute, and the case to be brought against him, in order that he may be able to meet it. In the present case the purchaser only told the seller that he had bought the gin for the purpose of analysis, and the seller might suppose the analysis was for the private information of the purchaser, or some one instructing him. The procedure on the prosecution is prescribed by ss. 20 and 21, which, by necessary implication, refer to the preceding sections. The purchaser failed also to comply with the provision of s. 14, which requires him to offer to divide the article into three parts, &c., for he only offered to divide it. Further, the provisions of s. 15 were not complied with.

[PER CURIAM. It will be unnecessary to consider any further questions if we hold that the notification to the seller of the

purchaser's intention to have the article analysed by the public analyst is a condition precedent to prosecution. We therefore desire to hear that question argued for the respondent.]

Jelf, for the respondent. No doubt Bowen purchased the article "with the intention of submitting the same to analysis;" but a prosecution may be instituted under s. 20, independently of s. 14. The offence of selling an article of food or a drug, which is adulterated, is created by s. 6. By s. 12, any purchaser of an article of food, or a drug, is entitled to have it analysed by the public analyst, and to receive a certificate of the result of the analysis, without telling the seller anything at all. Why should not a purchaser, after complying with s. 12, prosecute immediately under s. 20? Sect. 20 speaks no doubt of the analyst and his certificate, but that may refer to a certificate obtained under s. 12, just as naturally as to one obtained under ss. 14 and 15, and there is no need to resort to ss. 14 and 15 in order to give full meaning to ss. 20 and 21. If compliance with every one of the many requirements of ss. 14–16 is a condition precedent to prosecution, the statute will be practically a dead letter, for it will be almost impossible to prove compliance. Those sections are directory merely, and the justices acted on that view: but they only desire a decision for their guidance.

KELLY, C.B. I entertain no doubt upon this point, for I think these words do not admit of any question. Sect. 14 says, "that the person purchasing any article with the intention of submitting the same to analysis shall, after the purchase shall have been completed, forthwith notify to the seller or his agent selling the article his intention to have the same analysed by the public analyst." Mr. Jelf in effect asks us to strike those words out. When we look at s. 21 we see that the production of the certificate of the analyst is to be sufficient evidence of the facts therein stated, unless the defendant requires the analyst to be called. In order to see how that certificate is to be obtained we must look at the preceding sections. This is a penal Act, and would lead to great injustice if this provision in s. 14, which is intended for the benefit of the seller, might be disregarded where the person selling is, as in the present case, an ignorant barmaid. On the ground

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of convenience, as well as by the very terms of the statute, I think the notification required by s. 14 is a condition precedent to a prosecution under the Act.

POLLOCK, B., concurred.

Conviction quashed with costs.

Solicitor for appellant: *E. Sweeting, for Chesshyre, Cheltenham.*

Solicitor for respondent: *J. M. Weightman, for Philip Cooke, of Gloucester.*

Feb. 25.

[IN THE COURT OF APPEAL.]

BETTS *v.* THE GREAT EASTERN RAILWAY COMPANY.

Superfluous Land—Land not immediately available for the purposes of the Railway, but bonâ fide retained for such purposes—Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 127.

Land which is taken compulsorily by a railway company for the purposes of their Act, and which is bonâ fide retained by them with a reasonable expectation of using it for such purposes, does not at the expiration of ten years from the time fixed for the completion of the works vest in an adjoining owner as superfluous land under the Lands Clauses Consolidation Act, 1845, s. 127, merely because, from insufficiency of traffic, or from want of funds, the company cannot immediately apply it to such purposes, although it is in the meanwhile let out to yearly tenants, and applied to purposes, for which it is in its then condition suitable.

THIS was an appeal from a decision of the Court of Exchequer, pronounced upon the 6th of June, 1873, discharging a rule granted on the 4th of November, 1870, to enter a verdict for the plaintiff or for a new trial. The facts are stated in the report of the proceedings before that Court (1), and it will be sufficient here to make the following statement of them.

The action was brought by the adjoining owner to recover certain small pieces of land contiguous to the Great Eastern Railway, which had been compulsorily taken under the Acts, pursuant to which the railway was made. The time limited for the completion of the railway expired in 1851.

(1) Law Rep. 8 Ex. 294.

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On the trial of the cause before Channell, B., at the Norfolk Summer Assizes, 1870, it was proved that the land in question (with the exception of a small triangular piece) was a narrow strip, running along the east side of the railway, and immediately adjoining Diss station; it was divided by fences into five plots, containing respectively, 0*a.* 3*r.* 13*p.*, 0*a.* 2*r.* 1*p.*, 0*a.* 3*r.* 21*p.*, 0*a.* 0*r.* 14*p.*, and 1*a.* 3*r.* 14*p.* The plot of 0*a.* 3*r.* 13*p.* abutted upon the road from Diss to Scole; its breadth was greatest next this road, and the company had intended to erect here a gate-house and a weighing machine; it had been intended to use it to make a road leading from the road between Diss and Scole to the plot of 0*a.* 2*r.* 1*p.*; but from want of funds the road had not been made, and the land had been let for pasture. The plot of 0*a.* 2*r.* 1*p.* had been used by the company as a "lair" for cattle coming by the line, and for depasturing horses of the company used at the station. At the south-west corner of the plot of 0*a.* 3*r.* 21*p.* stood a coal-shed surrounded by a fence, which had been let to one, Quadling. Upon the east side of this shed, between it and the plaintiff's land, ran a roadway leading from the plot of 0*a.* 2*r.* 1*p.*, and then going in a curved line to the station; it was used for the purpose of driving cattle to the lair. The middle portion of the plot of 0*a.* 3*r.* 21*p.* was occupied by another coal-shed, also let to Quadling, by granaries and a beer-house let to tenants; but it was understood that the company might resume possession of them on paying compensation; the north portion of this plot was unoccupied. The plot of 0*a.* 0*r.* 14*p.* was used as a garden, and that of 1*a.* 3*r.* 14*p.* for growing turnips and other crops; they were wanted to make a road to the station from the north, and the latter plot was also wanted for the construction of sidings; the line here passed through a cutting which was in parts twenty feet below the surface; but through want of funds these works had not been carried out. The small triangular piece contained 0*a.* 1*r.* 3*p.*, and part of it formed the site of an old road, which had been diverted without due authority; and the defendants were doubtful whether they might not be compelled to restore the old line of road. The verdict was entered for the defendants, with leave to the plaintiff to move to enter the verdict for him.

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The appeal was in the form of a case "stated pursuant to the provisions of the 39th section of the Common Law Procedure Act." The case concluded thus: "The plaintiff appeals from the decision and rule of the 6th of June, A.D. 1873, and the question for the opinion of the Court of Appeal is, whether the said rule of the 4th of November, A.D. 1870, ought to have been discharged or ought to have been made absolute on all or any, and if so, then on which of the grounds therein stated.

"The Court of Appeal to make such rule upon this appeal as it may think fit, and to proceed thereon pursuant to the provisions of the Common Law Procedure Act, 1854."

Feb. 22, 23, 25. *Merewether, Q.C.*, and *Robert Williams*, for the plaintiff. So long as the judgment of this Court in *Hooper* v. *Bourne* (1) stands unreversed, it must be admitted that land which may within a reasonable time become useful for the purposes of the undertaking, is not superfluous, although it is not covered with the works of the company at the expiration of the period mentioned in the Lands Clauses Consolidation Act, 1845, s. 127: but the plaintiff is entitled to recover all the land which in 1861 the railway company intended to appropriate to objects unconnected with their undertaking; it was then their duty to make a survey of their property, and dispose of all that was not wanted.

With respect to the plot of 0*a.* 3*r.* 13*p.*, it has always been used as pasture, and there is no real ground for saying that the company intended to make upon it a road to the cattle lair and a gate-house and weigh-house; there is no satisfactory evidence to support the finding of the jury. The plaintiff admits that he cannot recover the plot of 0*a.* 2*r.* 1*p.*, because the company used it for purposes directly connected with their traffic, and, for the same reason, he must also abandon his claim to the roadway leading to that plot from the station; and as this roadway remains vested in the defendants, the plaintiff is not adjoining owner to the coal-shed surrounded by the fence: he must therefore give up all claim to it. But, except the roadway and this coal-shed, the whole of the plot of 0*a.* 3*r.* 21*p.* has vested in the plaintiff. The defendants were endeavouring to let the stables at the expiration of the ten

(1) 3 Q. B. D. 258.

years, and the other coal-shed was let to Quadling to be used for any purpose, to which he thought fit to apply it. The granaries and coal-sheds are not buildings required for the purposes of the undertaking; it is plain that their sites are superfluous. The plot of 0*a.* 0*r.* 14*p.* is cultivated as a garden, and has never been used for any purpose connected with the railway. The plot of 1*a.* 3*r.* 14*p.* is used for growing turnips and other crops, and is therefore merely agricultural land: the defendants allege that they require it for sidings; but its shape is inconvenient for that purpose, and moreover the height of portions renders it unsuitable. The suggestion of making a road upon these two plots is a mere after-thought, for the site of the intended road does not appear upon the earlier plans of the company's engineer. As to the small triangular piece, the circumstance that the defendants may require it to restore the road which they have wrongfully diverted, will not prevent it from becoming superfluous land; but at all events they can only require the site of the old road; the plaintiff is entitled to the rest of this piece.

A. Wills, Q.C. (*W. J. Metcalfe, Q.C.*, and *Austin Metcalfe*, with him), for the defendants.

[The Court intimated that they did not require to hear any argument on behalf of the defendants, except as to the plot of 0*a.* 0*r.* 14*p.*, and the plot of 1*a.* 3*r.* 14*p.*, and as to the small triangular piece.]

It is submitted that the only question which can be raised in this Court is, whether a verdict ought to have been entered by the Court of Exchequer for the plaintiff; the rule obtained in that Court was discharged upon the 6th of June, 1873, before the Supreme Court of Judicature Act, 1873, came into operation or even was passed; and although the Court of Exchequer Chamber would have had power to entertain the question of entering the verdict: Common Law Procedure Act, 1854, s. 34; yet in the present case it could not have granted a new trial, because the judges of the Court of Exchequer were unanimous in discharging the rule, and no leave to appeal was given: Common Law Procedure Act, 1854, s. 35. The language of the Supreme Court of Judicature Act, 1873, s. 22, as to pending business is very wide; but it does not confer a new right of appeal upon the present

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plaintiff. By the very terms of the case the plaintiff is limited to those grounds of appeal, which he might have urged before the Exchequer Chamber.

[The Court intimated that they wished to hear the argument for the defendants upon the merits.]

The jury found that the land was retained bonâ fide "for the purposes of the Act;" this is, in effect, a finding that it was "required" for the purposes of the undertaking; and the evidence was sufficient to support the verdict. As regards the plot of 0*a.* 0*r.* 14*p.* and the plot of 1*a.* 3*r.* 14*p.*, it is plain upon the evidence that in 1861 the company wanted them for the purpose of making an additional road to the station; and the latter plot was also wanted in order to make sidings for the increasing traffic of the railway. The small triangular piece was wanted, because the defendants might be compelled to restore the public road which had been diverted without due authority, and a portion of it would be needed in order to build the approaches to the bridge over the railway.

Merewether, Q.C., in reply. At the expiration of the ten years there was no reasonable prospect that any portion of the land in dispute would be required for the purposes of the undertaking, and therefore the decision of this Court in *Hooper* v. *Bourne* (1) does not assist the defendants; the mode in which they dealt with the land shews that they considered it superfluous; and their conduct is contradictory of the evidence adduced upon their behalf at the trial.

BRAMWELL, L.J. I wish to say that in the judgment which I pronounced in *Hooper* v. *Bourne* (1), I intended to intimate my entire concurrence with the decision in *Great Western Ry. Co.* v. *May.* (2) I think that in that case the House of Lords laid down a correct principle for determining what are superfluous lands.

I think that in a strict view of the law this action ought to be decided as the Court of Exchequer Chamber would have decided it, if the appeal had been brought before that Court, and if the Judicature Acts had not been passed; and I come to that conclusion upon general principles, upon a review of those statutes,

(1) 3 Q. B. D. 258. (2) Law Rep. 7 H. L. 283.

and also upon the very words of the special case at the beginning and end of it; but it is perhaps better not to look at the facts from a merely technical point of view, and I will proceed to say why I consider the verdict of the jury and the decision of the Court of Exchequer to have been right.

I think it plain that the plot of 0*a.* 2*r.* 1*p.* was required for the purposes of the railway, for it was kept by the company as a lair for cattle sent by the railway, and also for pasturage for horses used at the station; and in fact the plaintiff's counsel very properly admitted that judgment must be against him as to this plot.

Then arises the question whether the plot of 0*a.* 3*r.* 13*p.* is not wanted to make a road to this lair leading out of the road from Diss to Scole: the objection is that if the plot had been really wanted for that purpose, the road would have been made before the commencement of this action. It appears that the company received a small sum for the hire of the plot, and that they could manage for the time to do without the intended road; but it is plain that if the plaintiff were to offer them the agricultural value of the land, they would refuse it. It was objected on behalf of the plaintiff that the end of the plot nearest the public road is broader than the rest of it, and that a portion of that end cannot be wanted to make the intended road; the company allege that they propose to erect at the broader end a weighing machine and a gate-house. I do not think that the legislature intended that when a piece of land, taken as a whole, is wanted for the purposes of the railway, a discussion should be allowed whether small portions of it are superfluous; I do not think that if a railway company claim to retain a strip of land five yards wide for the purpose of making a road, when a width of four yards would be sufficient, an adjoining owner can recover as superfluous any portion of the strip of land. A court of justice must consider whether the land is substantially wanted; if it is, the company are entitled to retain the whole.

I now come to the plot of 0*a.* 3*r.* 21*p.* The plaintiff's counsel have abandoned the claim to the coal-shed surrounded with the fence; I confess that I have had some doubt about the granaries; they are occupied by tenants, and they form no part of the railway or its works, and therefore at first sight it does not seem

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that they are wanted for the purposes of the undertaking; but on the other hand it must not be forgotten that the granaries are used for storing corn sent by the railway, and the consequence of holding that these granaries have vested in the plaintiff would be, that the company would build some additional sheds, at which the corn could be unloaded from the trucks upon the railway into the carts of the present tenants and so conveyed to whatever granaries the latter might occupy. The tenants who occupy the granaries are enabled to avoid unnecessary labour, and I think it may fairly be said that the granaries are required for the purposes of the undertaking. A similar argument applies to the other coal-shed occupied by Quadling. The plaintiff's counsel admitted that he could not recover the roadway which leads out of the plot of 0*a.* 2*r.* 1*p.* past the fence round the coal-shed and thence to the line; but they did not altogether abandon the claim to the stables. Now railway companies find it necessary to use horses at their stations, and therefore they must have stables. The plaintiff claimed also the beerhouse; I imagine that if a refreshment-room is allowable at a railway station, a beerhouse also may be kept up. But it is unnecessary to decide this point, because, as I have said already, if a piece of land claimed by an adjoining owner is as a whole needed for the purposes of the railway, small portions of it, which happen to be superfluous, do not vest in him. It was suggested that, at all events, the north end of this plot of 0*a.* 3*r.* 21*p.* was superfluous; the plaintiff, however, cannot recover it, because the plot as a whole is wanted for the purposes of the railway.

I may remark that it is difficult to see how very small pieces of land lying alongside a railway can ever become superfluous: they will always be useful for the purpose of depositing soil, and it is to be observed that the company have reserved power to resume possession of the land which they have let.

The plots 0*a.* 0*r.* 14*p.* and 1*a.* 3*r.* 14*p.* may be taken together. It seems to me impossible that the judge could have directed the jury that these were superfluous, unless the evidence for the defendants upon the face of it was unworthy of credit: that evidence was that it was intended to make a new road to the station leading from the north: this evidence is in itself highly

probable, for the intended road would certainly afford much more convenient access to the station for persons coming from that direction; and I suppose that if funds had been forthcoming, the road would have been long ago constructed. It was also argued that the whole of the plot of 1*a.* 3*r.* 14*p.* could not be wanted for the purpose of making the intended road, and therefore that some portions of it must have vested in the plaintiff. I think that the defendants are entitled to say that until the road has been actually made, it is impossible to determine which part is really wanted for the purposes of the undertaking, and which is superfluous. There is no ground for imputing mala fides to the defendants, and the plaintiff cannot point out any substantial portion of the plot as a piece of land which will not be wanted for the road. Moreover there is evidence to which we must give credit that some portion of the plot will be required for sidings, and although the railway is in a cutting twenty feet below the level of the plot, we cannot say as matter of law that the plot is not wanted for sidings. Therefore the plaintiff cannot recover either the plot of 0*a.* 0*r.* 14*p.*, or the plot of 1*a.* 3*r.* 14*p.*

I now come to the small triangular piece of 0*a.* 1*r.* 3*p.* At one time during the argument I thought this piece must be awarded to the plaintiff, and that the judge ought to have directed the jury that it was superfluous land; my reason for thinking so was as follows: the site of the old road, which the defendants wrongfully diverted, still remains a road, and they might restore the old line of communication by simply building a bridge over their line; but upon further consideration I am of opinion that the plaintiff cannot succeed as to this triangular piece; if the defendants restore the old line of road they may have to raise its level, and they may have to build buttresses and approaches to the new bridge; in order to execute these works, they will require this triangular piece, and they may fairly say that it is required for the purposes of their undertaking. I have therefore come to the conclusion that the judge could not have directed the jury that, in point of law, this triangular piece was superfluous land, and I cannot say that either the verdict, or the decision of the Court of Exchequer, was wrong.

I therefore think that this judgment must be affirmed.

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BRETT, L.J. I am of opinion that the judgment of the Court of Exchequer was right, for the reasons given in that Court; it therefore seems to me unnecessary to determine the question which has been raised as to the construction of the Judicature Acts; I do not now venture at all to question what has fallen from Lord Justice Bramwell; and I may say that if this case is to be decided upon the same grounds as it was decided in the Court of Exchequer, much more may be urged upon the plaintiff's behalf than could be advanced if this were treated as a hearing before the Court of Exchequer Chamber, where the right of appeal was more restricted than it is to this Court. I decline therefore to give any opinion on the construction of the Judicature Acts.

The question, which we have to determine, seems to me to depend upon the principle, which in *Hooper* v. *Bourne* (1) we considered to be the result of *Great Western Ry. Co.* v. *May*. (2) It follows that we must consider whether upon the last day of the ten years if all the facts had been known it could have been foreseen that, owing to the ordinary development of the railway or neighbourhood, the land would within a reasonable time be required for the purposes of the undertaking. When this case was before the Court of Exchequer, it was considered that an agreement had been come to at the trial that with the assistance of the findings by the jury "the Court should determine whether, upon the facts proved, the lands must be deemed in point of law to have become superfluous lands." (3) Now the jury have found certain facts which go far to decide the whole case; they have found that "the whole of the lands in question were taken solely for the purposes of the Act; that they were and are duly fenced off from the adjoining lands; and that they have ever since been and are still retained bonâ fide for the purposes of the Act." The only matter, therefore, which remains to be determined is, whether it could have been reasonably foreseen in 1861, when the period of ten years expired, that the lands would be required for the purposes of the railway; they were obviously wanted by the company for the purposes of the undertaking at the time of the trial. I will now

(1) 3 Q. B. D. 258, at pp. 274, 282, 287.

(2) Law Rep. 7 H. L. 283.

(3) Per Kelly, C.B., Law Rep. 8 Ex. 294, at p. 299.

refer to the judgment of the Lord Chief Baron (1): he there points out that the plots of land sought to be recovered are in close proximity to the railway and station; and it seems to me that a court or a jury ought to hesitate to call land superfluous which immediately adjoins a station, and therefore must be wanted for any ordinary development of the traffic at that station. The Lord Chief Baron also notices the small size of these plots of land, and this is a most material consideration; for if there were any development at this station, the whole of them would probably be required to meet that development. The Court of Exchequer had before them the findings of the jury and the evidence given at the trial, and if I thought the question doubtful, I should not be prepared to overrule the judgment of the Court of Exchequer; for a Court of Appeal ought not to set aside the decision of the Court below upon what is substantially a question of fact, unless the decision is clearly wrong; but I do not think that the judgment of the Court of Exchequer was clearly wrong, and, on the contrary, it seems to me to have been right as to all these plots of land.

It was urged on behalf of the plaintiff that the granaries could not be required for the purposes of the railway, because they were occupied by tenants to the railway company. I will assume that the company have gone beyond their powers in letting the granaries, but that does not seem to me to decide the matter; there is evidence that the granaries are wanted for storing corn, and there is the very important circumstance that the railway company have reserved to themselves the right of taking possession of them at a future time; and in my opinion it makes no difference that they were willing to pay compensation upon resuming possession. That seems to me to be strong evidence to shew, that in the opinion of competent persons the land might be required for the purposes of the railway within a reasonable time. As to the remainder of the plots, in my opinion the evidence was strong to shew, that it might within a short time be wanted for the extension of the station and for the formation of a road to give more convenient access to persons coming to the station from the north. With

(1) Law Rep. 8 Ex. 294, at p. 300.

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regard to the triangular piece, in my opinion the railway company might very reasonably say that they did want it on account of the doubt, which they felt as to what they might be called upon to do with respect to the diverted road; it is not material what was the strict law applicable to the case: there was sufficient doubt about the case to make it reasonable that the railway company should reserve the whole of the triangular piece.

I think that the decision of the Court of Exchequer was right and ought not to be overruled.

COTTON, L.J. Owing to the view which I take of the facts, it is unnecessary for me to express any opinion as to the construction of the Judicature Acts; and it must not be assumed that I decide against the objection raised on behalf of the company, namely, that this appeal having been begun before the Judicature Acts, and having been intended to be argued before the Exchequer Chamber, and the special case having been stated pursuant to the Common Law Procedure Act, 1854, we cannot deal with the appeal otherwise than that Court could have dealt with it. I will however consider the appeal as brought under the Judicature Acts, for that is the most favourable view for the plaintiff.

The conclusion at which we arrived in *Hooper* v. *Bourne* (1) was entirely consistent with the decision in *Great Western Ry. Co.* v. *May*. (2) The principle laid down by the House of Lords in that case was of course binding upon us, and we intended to follow it. When Lord Cairns spoke of a survey being made at the end of the ten years (3), for the purpose of determining what land at that moment was superfluous, he did not mean that the officers of the railway were then to make a survey, and to decide whether the land was required for the purposes of the undertaking; for it is obvious that their decision would in no way be binding; what in my opinion Lord Cairns meant, was that the expiration of the ten years is the period to which the tribunal is to look, when it has to decide whether the land in dispute is superfluous; and the tribunal may take notice of facts which have since become known for the purpose of deciding, whether it could then have been foreseen, that

(1) 3 Q. B. D. 258. (2) Law Rep. 7 H. L. 283. (3) Page 294.

according to the ordinary development of the railway and the neighbourhood, the land would be required for the purposes of the railway within a reasonable time after the expiration of that period.

I will proceed to consider, whether the judge ought to have directed the jury that any portion of the land sought to be recovered was superfluous, and whether the findings of the jury were or were not supported by the evidence. No doubt it is a circumstance worthy of remark that a long time has elapsed since the passing of the Acts authorizing the construction of the railway, and that nevertheless some portions at least of the land have not been applied to the purposes of the undertaking. But that is explained by the circumstance, that the company have not had the funds necessary to enable them to make adequate provision for the development of the railway, and on the other hand there is very satisfactory evidence to shew that the traffic at Diss station has been largely increasing, and for years past additional accommodation has been needed. Starting from these facts I will proceed to consider whether the land sought to be recovered could, in 1861, be said to be required for the purposes of the undertaking. It is to be remarked that all the land, with the exception of the plot of 1*a.* 3*r.* 14*p.*, and of the triangular piece, lies in a narrow strip alongside the railway in the immediate neighbourhood of the station, and therefore it is land which would be wanted by the company if there should be any development of traffic at the station. I need not say anything as to this matter, except that I quite agree with what has fallen from Lord Justice Bramwell, namely, that when the question arises, whether a piece of land is superfluous, it is immaterial to consider whether a small portion of it is or is not required; the piece of land must be considered as a whole, and the judgment of the Court must depend upon this, whether or not the piece of land as a whole is required for the purposes of the undertaking. I think it would be unreasonable that a railway company, after the expiration of their compulsory powers, should be compelled to part with a portion of the piece of land, which, regarded as a whole, is useful to them for their undertaking.

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The counsel for the plaintiff admitted that he could not recover the plot of 0*a.* 2*r.* 1*p.*, and they abandoned the claim also to so much

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of the plot of 0*a.* 3*r.* 21*p.* as formed the site of the coal-shed surrounded by the fence, and the site of the roadway for the cattle; it seems to me that the abandonment of the claim to a portion of 0*a.* 3*r.* 21*p.* goes a long way towards deciding the question as to the residue, because the plot must be considered as a whole; it lies immediately behind the station, and thus raises a strong presumption that it is wanted for the purposes of the railway. As regards the stables, it appears that up to about 1861 the company themselves delivered goods coming by their railway; they then kept many horses; after they had discontinued to do so, they kept only two or three and let off a portion of the stables; but I cannot think upon these facts that the site of the stables became superfluous land. As to the granaries and coal-sheds, in my opinion, they did not vest in the plaintiff; under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 16, a railway company may erect warehouses and such "other works and conveniences as they think proper." I think that the company might lawfully construct such buildings as these, which are used not as shops or manufactories, but simply for depositing coal and grain brought along the railway, until it is convenient for the customers of the company to send them away; it would have been different if the company had let the buildings as an iron-foundry, even although the ore to be smelted were brought along the line; there is nothing to prevent a railway company from allowing any person, who brings goods along their line, from leaving them at a station as long as he pleases. I think that these considerations dispose of the question as to the coal-sheds and granaries. The question as to the beerhouse may seem a little more doubtful; but in any point of view the plaintiff cannot recover the site of it if a substantial portion of it is used for railway purposes; if the directors have wrongfully erected a beerhouse, and have thereby wasted the money of the shareholders, the remedy is not by enabling an adjoining owner to take possession of the site, but by taking proceedings against the directors for misapplying the funds of the company. I think, however, that the beerhouse may be considered as equivalent to a refreshment-room for third-class passengers. As regards the plot of 0*a.* 0*r.* 14*p.* and the plot of 1*a.* 3*r.* 14*p.* we cannot overlook the fact that they were wanted to make a

road and also sidings, and that the company did really intend to use them for that purpose. As regards the small triangular piece of land, I agree with Lord Justice Bramwell, for the reasons given by him, that we are not bound to overrule the judgment of the Court of Exchequer, and to hold that it vested in the plaintiff in the year 1861.

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Judgment affirmed.

Solicitors for plaintiff: *Hayes, Twisden, Parker, & Co., for T. W. Salmon, Diss.*

Solicitor for defendants: *C. A. Curwood.*

BLAKE *v.* APPLEYARD.

May 1.

Practice—Costs—Counter-claim—County Court Act, 1867, *s.* 5—*Rules of Court,* 1875, *Order XIX., Rule* 3.

The County Court Act, 1867, s. 5, does not apply to counter-claims, so that where the plaintiff proved a claim for 40*l.*, and the defendant a counter-claim for 10*l.*, the defendant, in the absence of any order as to costs, was held entitled to the costs of proving his counter-claim and of the issues, so far as they related thereto.

THIS was an appeal against an order of a judge at chambers, made on review of the taxation of costs in the action.

The plaintiff's claim was for 21*l.* for a growing crop of cabbages sold to the defendant, and 19*l.* for hire of a waggon, making together 40*l.*, and for damages for loss of use of the plaintiff's land through the defendant not removing the cabbages as soon as agreed on.

The defendant in his defence, admitted the two claims for 21*l.* and 19*l.*, but disputed the remainder of the plaintiff's claim. He also set up a counter-claim for, 1. Damages to the crop of cabbages by the plaintiff having run harriers over it. 2. Damages for the waggon not being reasonably fit. 3. Damages for misrepresentation as to the size of the crop.

At the trial at Croydon at the summer assizes, 1877, the plaintiff recovered on the admitted claim for 40*l.*, but failed on the remainder. The defendant obtained the verdict of the jury for

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10*l.* damages done by the harriers, but failed as to the remainder of his counter-claim. The learned judge before whom the cause was tried made no order as to costs.

On taxation, the plaintiff was allowed his costs of the cause generally, so far as he succeeded therein, but the master allowed the defendant his costs of proving so much of his counter-claim as he succeeded on, and his costs of the pleadings so far as they related thereto.

The plaintiff objected to the allowance to the defendant of any costs, on the ground that in the absence of any certificate or order as to costs, under Order LV., Rule 1, they followed the event, which was in the plaintiff's favour, and further, that the counter-claim having, by virtue of Order XIX., Rule 3, the effect of a statement of claim in a cross action, and the defendant having recovered a sum not exceeding 10*l.* in respect thereof, was not entitled to any costs of suit by virtue of the County Courts Act, 1867, s. 5, preserved by the 67th sect. of the Judicature Act, 1873.

On appeal to Field, J., at chambers, the master was directed to review his taxation so far as regards the costs of the counter-claim, and against this order the defendant appealed.

H. T. Cole, Q.C., and *Francis*, for the defendant. The objection that the County Court Act, 1867, applies, cannot be sustained, for the defendant has not recovered a judgment, but he has succeeded in diminishing the plaintiff's claim, and is entitled to his costs of doing so.

H. Matthews, Q.C. (*Spearman* with him). The event here has been in favour of the plaintiff, who is, therefore, entitled to his costs under Order LV., Rule 1, at all events by Order XIX., Rule 3, the defendant is placed in the position of having recovered in a cross action, and having recovered only 10*l.* he is entitled to no costs.

KELLY, C.B. My Brother Field seems to have treated this counter-claim as if it were an action brought by the defendant in the superior Court, but this it is not. The defendant has raised this counter-claim, and by Order XIX., Rule 3, it is to have the

4 C.P.D. 33.

same effect as a statement of claim in a cross action, but that provision is governed by the succeeding words, "so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim." Then it is said, by Order LV., Rule 1, costs are to follow the event, unless the judge otherwise orders. That is no doubt the case, and the plaintiff having recovered, obtains the general costs; but there is nothing to prevent the defendant from obtaining the costs of those matters on which he succeeds. I think, therefore, the appeal must be allowed.

POLLOCK, B. I entirely agree. The County Court Act did not contemplate counter-claims, but it contemplated the selection of a tribunal by the plaintiff, who has the choice where he will go to try his claim. When we look at Order XIX., Rule 3, the words "so as to enable the Court to pronounce a final judgment," shew that the rule points to the mode of procedure in the court, and is not intended to make the counter-claim stand in every respect on the same footing as a claim in a cross action. *Staples* v. *Young* (1) supports this view. This Court there held that where plaintiff and defendant each succeed to some extent, the plaintiff recovers the balance of his claim over that which the defendant proves. The Court negatived the argument that there were two judgments, one in favour of the plaintiff and the other of the defendant. I think, therefore, that the County Court Act, does not apply to this case, and that the taxation of the master was correct.

Order reversed.

Solicitors for plaintiff: *Blake & Snow.*
Solicitors for defendant: *Pickett & Mytton.*

(1) 2 Ex. D. 324.

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Feb. 27.

[IN THE COURT OF APPEAL.]

CLOW *v.* HARPER.

Practice—Compulsory Reference—Common Law Procedure Act, 1854, *s.* 3.

In an action for breach of covenant to repair the defendant denied his liability. A judge having ordered the action to be referred compulsorily under the Common Law Procedure Act, 1854, s. 3, the Exchequer Division affirmed the order:—

Held, that the order must be reversed, for the judge had wrongly exercised his discretion in referring it.

Semble (by Cockburn, C.J., Brett and Cotton, L.JJ.), that as there was a preliminary question as to the liability of the defendant to be decided before any question of account could arise, there was no power to refer the action compulsorily under the above enactment.

ACTION against the defendant as assignee of lessee for breaches of covenant. First, for not having, once in every third year, painted in good oil colours all the outside wood and ironwork of the premises; secondly, for not having once in every seventh year painted and papered the inside of the premises; thirdly, for not having surrendered and yielded up to the plaintiff the messuage and premises in good and substantial repair and condition.

The defendant, by his statement of defence, denied the breaches of covenant. Issue thereon.

The plaintiff's schedule of dilapidations contained thirty-eight items, pointing out in detail the repairs required in the several rooms and parts of the house.

On the 1st of February a summons, issued at the instance of the plaintiff, calling upon the defendant to shew cause why the action should not be compulsorily referred, was heard and dismissed by the master. On appeal to a judge at chambers he made an order that the cause be referred to the certificate of one of the masters of the Exchequer Division under 17 & 18 Vict. c. 125, s. 3. On appeal to the Exchequer Division the Court affirmed the judge's order.

The defendant appealed.

C. Russell, Q.C., and *R. V. Williams*, for the defendant. The question in dispute is not mere matter of account that can be

referred under s. 3 of the Common Law Procedure Act, 1854. (1) The defendant denies his liability to repair; he insists that the premises are in a substantial state of repair, and that there has been no breach of covenant; the defendant has a right to take the opinion of the jury as to the state of the premises when he gave up possession. In making the order for a compulsory reference it has been assumed against the defendant that there is a cause of action. Until the question of liability has been established, there may or may not be mere matter of account. If a liability against the defendant is not established, it would be unnecessary to go into any account. The order, at all events, is premature. Whether there shall be a compulsory reference under s. 3 is a question for the discretion of the Court, and in its discretion in the present case the Court will not refer this action and deprive the defendant of his right to a trial by jury.

Sills, for the plaintiff. The question turns upon s. 3 of the Common Law Procedure Act, 1854. The decisions have established, and the practice has been in conformity with the decisions, that under this section the Court or a judge may order, if they think fit, the whole matter in dispute to be referred compulsorily. A judicial interpretation was put on this section in *Browne* v. *Emerson* (2) decided in 1856, and which has been acted on ever since. It was there laid down that the true construction of the enactment was that where "the matter in dispute consists, either wholly or in part, of matters of mere account, the compulsory reference may be, either of the whole matter in dispute, or of part only of the matter in dispute, as the Court or judge may think fit." Both the judge at chambers and the Exchequer Division have, in their discretion, held that the action ought to be referred, and with the exercise of that discretion this Court will not

(1) By s. 3, "If it be made to appear at any time after the issuing of the writ to the satisfaction of the Court or a judge, upon the application of either party, that the matter in dispute consists wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the Court."

(2) 17 C. B. 361; 25 L. J. (C.P.) 104.

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interfere. This construction has been acted upon in numerous cases. In *Insull* v. *Moojen* (1) it was decided that the master in a compulsory reference could not refuse to inquire into a question of fraud, and the recent case of *Birmingham and Staffordshire Gas Co.* v. *Ratcliff* (2) is a decision to the same effect. In *Cummins* v. *Birckett* (3) an action for dilapidations was referred; it is true money was paid into Court in that action, but still in such a case the liability is disputed beyond the sum paid into Court. In *Angell* v. *Felgate* (4) the action was for damages for not delivering up to the plaintiff at the expiration of the term demised premises in the same state and condition as they were at the commencement of the term, and for a breach of a covenant in a lease to deliver up in good repair. The defendant paid 10*l.* into court, and the plaintiff claimed damages ultra; although the case involved questions of disputed fact, the Court referred it compulsorily to arbitration.

The present order was therefore rightly made. The particulars of the breaches contain thirty-eight items of account, and the inquiry will be of so minute and detailed a character as to render a trial by jury most inconvenient.

R. V. Williams was not heard in reply.

COCKBURN, C.J. In this case the order of the Exchequer Division must be reversed. We are told that a practice has grown up that where some part of the matter in dispute in an action is matter of account, the whole action is referred, and that the order in question is consistent with such practice; and this may be so. Nevertheless, if on a review of the statutory provisions we come to the conclusion that there was no power to make the order, sitting here in the Court of Appeal we are at liberty to disregard such practice and to annul the order. We must see what is the true construction of s. 3 of the Common Law Procedure Act, 1854. The intention of the legislature was that disputes involving mere matter of account should not be brought into an expensive form of litigation and decided by a trial by jury, but should be disposed of by

(1) 3 C. B. (N.S.) 359; 27 L. J. (C.P.) 75.

(2) Law Rep. 6 Ex. 224.

(3) 27 L. J. (Ex.) 216.

(4) 7 H. & N. 396; 31 L. J. (Ex.) 41.

referring them to an arbitrator to be selected by the parties, or to an officer of the court. The language of s. 3 is, "if it be made to appear that the matter in dispute consists wholly or in part of matters of mere account, which cannot conveniently be tried in the ordinary way, it shall be lawful for the court or judge to order that such matter, either wholly or in part, be referred." The first part of these words corresponds exactly with the latter part. I think this shews that the legislature meant that where the matter in dispute involved mere matter of account, it should be competent to send the whole matter of account, or that part of the dispute which involves matter of account, to an arbitrator; but that, if some other matter, not being matter of account, is in dispute, such other matter should not be made the subject of the order, but the order should be confined to that part alone which is matter of account. First, it should be ascertained what is the matter in dispute. If part of it only is matter of mere account, that part should be directed to be disposed of by arbitration; but that part alone: otherwise we should take away the right of either party to have issues not involving mere matter of account tried in the ordinary way. Every man has a right to a trial by jury, unless it is taken away by some statutory power, and I do not think that in the present case the right is taken away. For, here there is a preliminary question how far the defendant was bound by the covenants in the lease to repair the demised premises; as also how far the premises were out of repair: if these questions are decided in favour of the defendant, there will not be any matter of account, and in any point of view the question of account is only secondary and subordinate. In my view the Exchequer Division had no power to take away trial by jury in the substantial matter, merely because there was incidentally matter of account. Its power was limited to directing a reference as to the matter of account alone.

I must also say that I think that, as matter of discretion, the order ought not to have been made. Whether we give the larger or narrower construction to s. 3—and I think the last is the correct construction—this judgment should be reversed.

BRAMWELL, L.J. I do not like to say that the practice which

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has so long prevailed is wrong, and I have some hesitation in saying that there is no jurisdiction to make this order, but I certainly think that the present order ought not to have been made. Whether or no the covenants have been broken is a question which ought to be tried by a jury, and I do not see why this part of this case should not be tried by them.

BRETT, L.J. I am of the same opinion. I think that an order for a compulsory reference in this case could not be made. I do not think that this case falls within s. 3 of the Common Law Procedure Act, 1854. If I were obliged to construe that section on the present occasion, I think the right construction to put upon the section is, if part of the matter in dispute is mere matter of account, and part is not, that then the order ought to be made to refer that which is matter of account, but not the other part. But a practice has grown up to order, in such a case, the whole action to be compulsorily referred.

It is not necessary to decide whether such an order can or cannot be made. But I am clear that in the present case no such order ought to have been made: here there is no part of the action which is mere matter of account: the defendant denies his liability for every item. There is a compound question of liability and account, and there is no matter which is mere matter of account. There may be a matter of account if the defendant is liable, but when he denies his liability it is not then a question of mere account. The short way to put this case is, that after the decision of the liability upon the covenants there may be a matter of account, but at present no part of the plaintiff's claim is mere matter of account.

COTTON, L.J. I agree with the Lord Chief Justice and Lord Justice Brett on the construction that they have put on s. 3 of the Common Law Procedure Act, 1854. All the cases which have been cited before us are cases of admitted liability—in most of them money had been paid into court. But in the present case the liability is denied in toto; it is alleged on the part of the defendant that no covenant has been broken; and until a liability is established, no question will arise as to the quantum of damages which is to be

paid for dilapidations. In a technical point of view there can be no question as to the amount which the defendant ought to pay until the question of liability is decided; there is therefore no matter of mere account.

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Appeal allowed.

Solicitors for plaintiff: *Dod & Longstaffe.*
Solicitor for defendant: *Ernest Board.*

[IN THE COURT OF APPEAL.]

March 27.

MARSDEN *v.* THE SAVILLE STREET FOUNDRY AND ENGINEERING COMPANY, LIMITED.

Patent—First and True Inventor—Invention communicated in England by one British subject to another.

The communication, made in England by one British subject to another, of an invention does not make the person to whom the communication is made the first and true inventor, within the meaning of the statute 21 Jac. 1, c. 3, so as to enable him to take out letters patent for the invention.

The legal personal representative of a person who has made an invention, but not taken out letters patent for it, cannot take out such letters patent.

THIS was an action to restrain the infringement of a patent granted to the plaintiff Sarah Marsden.

The first paragraph of the statement of claim was as follows:—

"Before and at the time of the granting of the letters patent hereinafter mentioned, the plaintiff Sarah Marsden, of Leeds, was in possession of an invention for a certain new manufacture, that is to say, for [description] which had been communicated to her by her late husband, H. R. Marsden, of Leeds, aforesaid, and the same was not in use by any other person or persons, but was a new invention as to the public use and exercise thereof within the United Kingdom of Great Britain and Ireland, the Channel Islands and the Isle of Man, and was first introduced therein by the said plaintiff, Sarah Marsden."

The defendant demurred to the statement of claim as bad in law, on the ground that, on the facts as set forth in the 1st paragraph of the statement of claim, the supposed invention not having been communicated to the plaintiff by a foreigner residing abroad,

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the plaintiff was not, within the meaning of the statutes, the first and true inventor, and that the letters patent were therefore invalid.

Feb. 15. The demurrer was allowed by Pollock, B.

The plaintiff appealed.

It was stated at the bar that the plaintiff was the legal personal representative of her husband, and had found the invention among his papers.

Aston, Q.C., and *R. S. Wright*, for the plaintiff. A person who is the lawful recipient of an invention from a person in this country is a "true inventor" within the meaning of the patent law.

[JESSEL, M.R.:—Is there any authority for that? The cases holding that a communication from abroad would enable a person to take out a patent were an extension of the law, and originated at a time when communication with foreign parts was so difficult that there was merit in obtaining an invention from abroad.]

The lawful disclosure of an invention is what constitutes the merit as regards the public: Webster Pat. Ca. I. 719; *Edgebury* v. *Stephens*. (1) The case of the *Clothworkers of Ipswich* (2) shews that "inventor" cannot be understood in its popular sense. The cases can only be explained by referring them to the principle that what is to be looked to is the benefit which the public derives from an invention being made known, and that the person who has lawful exclusive possession of it and makes it known is to be considered the inventor. Patents take effect from the Royal Prerogative, which is merely restricted by the statutes as regards the duration of the monopoly, and such patents as this would clearly have been good before the Acts.

Herschell, Q.C., and *Macrory*, contrà, were not called upon.

JESSEL, M.R. This is a mere experiment. From the time of the passing of the Statute 21, Jac. 1, c. 3, down to the present time, no one, so far as I know, has contended in a court of law, much less has any court of law allowed, the validity of such a con-

(1) Ibid. 35. (2) 1 Roll. 4, Godb. 252.

tention as that a communication made in England by one British subject to another British subject can be patented by the receiver of the communication, so as to make the receiver the true and first inventor within the meaning of the patent laws.

It has been argued that before the statute of James, such patents were valid and were allowed by the judges, and that the statute merely restricts the duration of the patent, and does not destroy the right as it previously existed. Even supposing that were so, the statute defines who are considered to be worthy recipients of the grant of such a monopoly, as it was then called, and the definition so given has been followed ever since. It is difficult to say à priori on what principle a person who did not invent anything, but who merely imported from abroad into this realm the invention of another, was treated by the judges as being the first and true inventor. I have never been able to discover the principle, and although I have often made inquiry of others, and of some who are more familiar with the patent law than even I am, although I cannot pretend not to possess a considerable familiarity with it, I could never get a satisfactory answer. The only answer was, It has been so decided, and you are bound by the decisions. But it is an anomaly as far as I know, not depending on any principle whatever. It has never been declared by any judge or authority that there is such a principle, and, not being able to find one, all I can say is, that I must look upon it as a sort of anomalous decision which has acquired by time and recognition the force of law.

The grounds upon which it is put we do know. In the *Clothworkers of Ipswich Case* (1) we have this said about it: "The king granted unto B. that none besides himself should make ordnances for battery in the time of war: such grant was adjudged void. But if a man hath brought in a new invention and a new trade within the kingdom in peril of his life and consumption of his estate or stock, &c., or if a man hath made a new discovery of anything, in such cases the king of his grace and favour in recompense of his costs and travail may grant by charter unto him that he only shall use such a trade or trafique for a certain time, because at first the people of the kingdom are ignorant, and have

(1) Godb. pp. 252, 254.

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not the knowledge or skill to use it. But when that patent is expired the king cannot make a new grant thereof." Therefore the decision goes no further than this—that at that time, considering the difficulty which then attended communication from abroad, a man who brought in anything from abroad did it at the peril of his life (for travelling was not without danger in the time of Henry VIII.) and consumption of his estate and stock, and it was therefore such a meritorious service done to this kingdom, that the king might lawfully grant him a monopoly. That is the ground it is put upon. Now, there is some reason in that. It does not make him the true and first inventor, but it does shew a meritorious consideration which warranted an exception from the general rule that monopolies could not be granted. How that applies to a gentleman in Leeds whispering in his neighbour's ear in a street in Leeds, I do not know. At all events it does not appear to me that such a case as this is within the grounds I have mentioned.

Another case referred to by patent lawyers as declaring the law upon this subject, although it is only a statement in argument of the old decided cases, is the case of *Darcy* v. *Allin* (1). The passage I am going to read is at p. 182. It is a statement by counsel in argument of what the decisions were, and is equivalent to a report therefore of what those decisions were. "Now therefore I will shew you how the judges have heretofore allowed of monopoly patents, which is that where any man by his own charge and industry, or by his own wit or invention, doth bring any new trade into the realm, or any engine tending to the furtherance of a trade that never was used before, and that for the good of the realm; that in such cases the king may grant to him a monopoly patent for some reasonable time, until the subjects may learn the same, in consideration of the good that he doth bring by his invention to the commonwealth, otherwise not." He is to bring it into the realm. Then he cites his authorities: "In the 9th Eliz. there was a patent granted to Mr. Hastings of the Court—that in consideration that he brought in the skill of making of frisadoes as they were made in Harlem and Amsterdam beyond the seas, being not used in England, that therefore he

(1) Noy, 173.

should have the sole trade of the making and selling thereof for divers years, charging all other subjects not to make any frisadoes in England during that time upon pain to forfeit the same frisadoes by them made, and to forfeit also 100*l.*, the one moiety thereof to the Queen's Majestie, the other to Mr. Hastings. Upon which patent Mr. Hastings, about twenty years past, exhibited an information in the Exchequer against certain clothiers of Coxfall for making of frisadoes contrary to the intent of this patent." Then the defence was that they used to make them before the patent and that was allowed. "Another monopoly patent was granted to Mr. Matthey, a cutler at Fleet Bridge, in the beginning of this queen's time, which I have here in Court to shew, by which patent it was granted unto him the sole making of knives with bone hafts and plates of lattin, because, as the patent suggested, he brought the first use thereof from beyond seas." That was the form of the patent. Then he gives a third patent which has no bearing on this case because it was a patent granted to a man for an invention within the realm. That was "a monopoly patent granted to one Humphrey of the Tower for the sole and only use of a sieve or instrument for melting of lead, supposing that it was of his own invention and therefore prohibited all others to use the same for a time." Now of the three examples, two of them had been brought beyond the seas and the third was the man's own invention. He gives them as examples of his own proposition that those are the only two cases in which the Crown had the right to grant a monopoly. No doubt it was that user which induced the judges, after the passing of the statute of James, to treat the man who brought the invention from beyond the seas as being in the same position as the first and true inventor, or as being in an equivalent position, and gradually the language seems to have been changed and he was treated as the true and first inventor.

Now that is the origin of the decisions, and that being the origin of them, what possible right have we to say that we can now extend that privilege, beyond the importation of an invention from beyond the seas, to the case of a man (I am dealing with the real case as told us and not the case as appears by the statement of claim) who dies before taking out a patent, and whose legal personal representative, finding the invention sufficiently described

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amongst his papers, thereupon obtains a patent as upon a communication from him. Whether or not there should be legislative provision for such a case it is not for us to say. But there is none. He is neither the first nor the true inventor within the ordinary or existing legal meaning of the term.

It appears to me therefore that the patent is bad and that the demurrer was properly allowed.

COTTON, L.J. I agree. It may be a hardship that there is no possibility under such circumstances for Sarah Marsden to obtain a good patent, but that is for the legislature, not for us to consider. The only exception from the necessity of there being an invention by the person who takes out a patent is the case of a communication made from abroad. That probably went on the principle mentioned by the Master of the Rolls, and acted upon in the old cases, of treating the person who introduced from abroad a new trade or invention as in the same position as the true and first inventor. I cannot see that by any means we can extend the exception to such a case as the present, where the lady finds something among her husband's papers which was an invention not patented by him, but which might have been the subject of a good patent, if he had applied for it.

THESIGER, L.J. I am of the same opinion.

Judgment affirmed.

Solicitor for plaintiff: *J. H. Johnson.*
Solicitor for defendants: *G. Lucas.*

ROOK, APPELLANT; HOPLEY, RESPONDENT. 1878

May 18.

Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 25—*Nature, Substance, and Quality of Article demanded—Exemption of Defendant—Written Warranty.*

On a prosecution under the Sale of Food and Drugs Act, 1875, for selling as lard a substance which was lard adulterated with upwards of 15 per cent. of water, the defendant proved that he sold the substance in the same condition as it was in when he bought it, and that when he purchased it he received an invoice in which it was described as lard:—

Held, that the invoice was not a written warranty within the 25th section, so as to discharge the defendant.

CASE stated by the stipendiary magistrate of Manchester under 20 & 21 Vict. c. 43.

At a petty session holden at the City Police Court in Manchester, Andrew Thomas Rook (inspector of nuisances of the city of Manchester and an officer appointed by and acting for the council of the city under the sale of Food and Drugs Act, 1875), hereinafter called the appellant, appeared by his solicitor in support of a summons issued on an information preferred by him against John Hopley, hereinafter called the respondent, charging that the respondent did, on the 3rd of July, 1876, within the city aforesaid, sell to the prejudice of the appellant, the purchaser thereof, a certain article of food, to wit, lard, which was not of the nature, substance, and quality of the article demanded by him, contrary to the form of the statute in that case made and provided. The information having been heard at the petty sessions and dismissed, the appellant applied for a case which was stated as follows:

By s. 6 of 38 & 39 Vict. c. 63 (Sale of Food and Drugs Act, 1875), it is enacted that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding 20*l.*"

By s. 25 it is enacted that "if the defendant in any prosecution under this Act prove to the satisfaction of the justices or court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that he had

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no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution."

The appellant, on the 3rd of July, 1876, during the daytime entered the shop of the respondent, and there found the shopman of the respondent standing behind the counter, upon which were a substance appearing to be lard, and other commodities. The appellant said to the shopman, "I want a pound of lard." The shopman thereupon handed to the appellant a pound of the said substance, saying at the same time that the price was 8*d.*, which the appellant then paid.

The substance was handed to the public analyst, who certified that it was a sample of adulterated lard, and contained the percentages of foreign ingredients as under, namely, upwards of 15 per cent. of water.

The magistrate found as a fact that the lard was adulterated with water to the extent described in the certificate of the public analyst.

All matters and things appointed by the sale of Food and Drugs Act, 1875, to be done and performed by any person purchasing any article with the intention of submitting the same to analysis, were duly done and performed by the appellant in respect of the lard and the purchase made by him as aforesaid.

The respondent proved that he had purchased of William Walker, a wholesale cheese factor and provision merchant in Liverpool, amongst other goods, four tins of lard, and at the time of the purchase received a document of which the following is a copy:—

"20th June, 1876.

"Bought by Mr. J. Hopley, Manchester, of William Walker, cheese factor and provision merchant.

"4 Tins lard, 'No. 1.'

28 lbs. each, 1 c„ 0 „ 0 K @ 55*s.* . £2 15 0."

The respondent also proved that the substance purchased by the appellant as aforesaid was a portion of the substance contained in the four tins mentioned in the document, and was sold by the respondent to the appellant in the same condition as it was purchased and received by the respondent from Walker.

The respondent proved to the magistrate's satisfaction that when he purchased the article in question from Walker, what he asked to be supplied with was lard, and that the respondent had no reason to believe when he sold the adulterated substance to the appellant that it was otherwise than pure lard, and that he sold it in the same state as when he purchased it.

No evidence was offered by either party to explain the meaning of the word and figure "No. 1," as used in the document, or that there is any article known in the trade as lard "No. 1." No suggestion was made by the appellant or by the respondent that the word and figure "No. 1," or anything else in the document, imported any addition or qualification to the word "lard."

It was contended on the part of the respondent that the document was a sufficient written warranty within the 25th section of the Act, and that he ought accordingly to be discharged from the prosecution.

The magistrate decided the question in favour of the respondent, and discharged him from the prosecution.

The Court was to reverse or affirm the determination or remit the case with the opinion of the Court thereon, or make such other order in relation to the same as the Court might see fit.

J. Brown, Q.C. (*Dutton* with him), for the appellant. The invoice is not a warranty, but a description: *Josling* v. *Kingsford* (1); *Nichol* v. *Godts* (2); and certainly it is not the express written warranty required by the statute.

Ambrose, Q.C., for the respondent. The prosecution have not proved that the article asked for by the appellant was not supplied to him. They have not shewn that lard with 15 per cent. of water is not of the nature, substance, and quality of lard, and it is quite possible the respondent may come within the exception, which the prosecution ought to have negatived. Further, the invoice is a warranty. The object of the Act is to prevent collusion, by having written evidence that the person accused purchased the goods in the same condition as that in which he sold them, and that would be attained if this were held to be a warranty. [He referred to

(1) 13 C. B. (N.S.) 447; 32 L. J. (C.P.) 94.
(2) 10 Ex. 191; 23 L. J. (Ex.) 314.

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Gardiner v. *Gray* (1); *Allan* v. *Lake* (2); *Jones* v. *Just* (3); *Bowes* v. *Shand* (4); *Randall* v. *Newson* (5).]

J. Brown, Q.C., was not called on to reply.

KELLY, C.B. I am of opinion that the appellant is entitled to the judgment of the Court. I regret to have to come to that decision, because it is impossible not to see that this is a hard case, but with that we have nothing to do here. The facts of the case are very simple. The appellant purchased this article, which he caused to be subjected to analysis. It turned out to be (though in one sense it may be called lard) of the quality and nature described by the analyst as "adulterated lard," containing 15 per cent. of the foreign ingredient water. The main defence is that the respondent is protected under the 25th section, because he sold the article just as he received it, having himself bought it with an invoice which it is contended amounts to a written warranty within the statute. A number of authorities were referred to on the question whether a description in an invoice amounts to a warranty, but I do not propose to go into those cases. Nor do I say what my decision on those cases would be if they came before me in a court of appeal. The decision in *Josling* v. *Kingsford* (6) is applicable to this case, and in view of that decision I cannot hold that this invoice contains anything more than a description, which cannot be deemed to be a warranty. But then it is further argued for the respondent that the article sold to the appellant was that which he demanded. In one sense it might be called "lard," but looking at the analysis, the finding of the magistrate, and the other facts in the case, I am unable to say that the appellant was supplied with the article for which he asked. I think the decision of the magistrate was wrong, and the case must be remitted with our opinion.

POLLOCK, B. I also think that the appellant is entitled to judgment, and I base my decision entirely on the construction of this Act itself. It is a case of great importance, because in all the

(1) 4 Camp. 144.
(2) 18 Q. B. 560.
(3) Law Rep. 3 Q. B. 197.
(4) Law Rep. 2 App. Cas. 455.
(5) 2 Q. B. D. 102.
(6) 13 C. B. (N.S.) 447; 32 L. J. (C.P.) 94.

earlier statutes it was required that the person who prosecuted should shew that the person selling the article either adulterated it himself or knew that it was adulterated when he sold it. This state of things has been altered, and now new and more stringent provisions are introduced to protect from adulteration, and it is requisite that we should be careful in putting a construction upon them. Now s. 6, under which it is said the respondent comes, provides that the sale must be to the prejudice of the purchaser. This is not expressly found in the case, but the magistrate has set out the finding of the analyst, and I think it sufficiently appears that the sale was to the prejudice of the purchaser. There are several exceptions in the section, all of which it was open to the respondent to raise before the magistrate and to have dealt with there; moreover the statute hedges the vendor round with protections. If any of those exceptions exist, the person charged has abundant opportunity of proving them. To come to the facts of this case, the article demanded was lard. The public analyst has found that the article sold was adulterated lard in which there was upwards of 15 per cent. of water, an ingredient foreign to lard. There is nothing to bring the person who sold within the exceptions in s. 6, and I can come to no other conclusion than that this was an article of food which was not the article asked for, and which was sold to the prejudice of the purchaser. Turning to the question of the construction to be put on the 25th section, which protects the vendor where he has bought the article with a written warranty, I say nothing as to the decided cases, but I base my decision on the section itself, and looking to that I think there was no warranty. It is very easy in such a document to say that the goods are warranted, but no such expression occurs here. In my opinion, what is required by the statute is a writing expressing on the face of it that it is a warranty. There is nothing of that sort here, and I therefore think the respondent has failed to bring himself within the protection of the 25th section.

Case remitted.

Solicitor for appellant: *R. F. Austin for W. H. Talbot, Manchester.*

Solicitors for respondent: *Le Riche & Son, for Cobbett, Wheeler, & Cobbett, Manchester.*

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Jan. 23.

[IN THE COURT OF APPEAL.]

THE ATTORNEY GENERAL *v.* LAMPLOUGH.

Statute—Repeal of part—Effect of Repeal—Stamp Duties on Medicines—52 Geo. 3, c. 150—3 & 4 Wm. 4, c. 97, s. 20.

The statute 52 Geo. 3, c. 150, imposed a stamp duty on a number of articles specifically named in a schedule, and, among others, on "waters, videlicet, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters," and also by a general clause at the end of the schedule on "all other . . . . waters" to be used as medicines made by any person, and by public notice or advertisement held out to the public by the makers, vendors, or proprietors thereof, as beneficial to the prevention, cure, or relief of any disorder or complaint affecting the human body. The statute 3 & 4 Wm. 4, c. 97, s. 20, repealed so much of the schedule to the former Act as is contained in the words commencing "waters, videlicet."

A composition sold in a solid state contained three ingredients, one of which was a medicine, the other two, bicarbonate of soda and tartaric acid, being added to evolve carbonic acid gas when it was dissolved in water; it was advertised by the vendor as a medicine:—

Held, by the Court of Appeal, Bramwell, Brett, and Cotton, L.JJ., overruling the decision of the majority of the Exchequer Division, that the article was a "water," and was taxable as such by the schedule of 52 Geo. 3, c. 150, and that by the repeal of the schedule so far as it related to "waters" the article did not become taxable under the general clause.

This was an information at the suit of the Attorney General.

The defendant was the maker and vendor of Lamplough's Pyretic Saline, and the question raised was whether that article was liable to duty under 52 Geo. 3, c. 150, s. 1, which amends an Act 44 Geo. 3, c. 98, for granting stamp duties on medicines and on licences for vending the same.

In the schedule to 52 Geo. 3, c. 150, s. 1, are enumerated alphabetically a large number of articles to which the duty is to attach, and when the Act was passed this schedule contained the following item:—"Waters, videlicet, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters."

At the end of the list of named articles are the following general words. "And also all other pills, powders, lozenges, tinctures, potions, cordials, electuaries, plaisters, unguents, salves, ointments, drops, lotions, oils, spirits, medicated herbs and waters, chemical and officinal preparations whatsoever, to be used or applied externally or internally as medicines or medicaments for the prevention, cure, or relief, of any disorder or complaint incident to or in anywise affecting the human body, made, prepared, uttered, vended, or exposed to sale by any person or persons whatsoever wherein the person making, preparing, uttering, vending, or exposing to sale the same hath, or claims to have, any occult secret or art for the making or preparing the same, or hath, or claims to have, any exclusive right or title to the making or preparing the same, or which have at any time heretofore been, now are, or shall hereafter be prepared, uttered, vended or exposed to sale under the authority of any letters patent under the great seal, or which have at any time heretofore been, now are, or shall hereafter be, by any public notice or advertisement, or by any written or printed papers or handbills, or by any label or words written or printed, affixed to or delivered with any packet, box, bottle, phial, or other inclosure containing the same, held out or recommended to the public by the makers, vendors, or proprietors thereof, as nostrums or proprietary medicines, or as specifics, or as beneficial to the prevention, cure, or relief of any distemper, malady, ailment, disorder, or complaint incident to or in anywise affecting the human body."

The statute 3 & 4 Wm. 4, c. 97, s. 20 (1), entitled "An Act to prevent the selling and uttering of forged stamps and to exempt from stamp duty artificial mineral water in Great Britain, &c.," after reciting the statute of 52 Geo. 3, c. 150, and that it was expedient to alter the schedule in the manner thereinafter mentioned, enacted that so much of the schedule as is contained in the words (which were set out) commencing "waters, videlicet," should be repealed.

At the trial before Cleasby, B., at the Easter Sittings, 1877, in Middlesex, the composition of Lamplough's Pyretic Saline was stated to be tartaric acid 45·7, bicarbonate of soda, 52·4, and

(1) Repealed by the Statute Law Revision Act, 1874, 37 & 38 Vict. c. 35.

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chlorate of potash 1·9, and it was shewn that the last-named ingredient was a medicine, that the soda and acid evolved carbonic acid gas on the addition of water to the pyretic saline, and that the article was advertised as a cure for a number of disorders or complaints affecting the human body. Upon proof that no stamp duty was paid a verdict was entered for the Crown, leave being reserved to set aside this verdict and enter one for the defendant.

A rule was obtained accordingly, on the ground that on the true construction of the Act, Lamplough's Pyretic Saline was not liable to duty.

June 11, 1877. *Sir H. S. Giffard, S.G.*, and *Dicey*, for the Crown. The effect of the repealing statute is to strike out the paragraph as to mineral waters from the schedule, which must be read as though that clause had never been inserted. Reading the statute as it stands without that paragraph, it is clear that this article comes within the general words in the schedule, whether it is regarded as intrinsically a medicine or only as being recommended as such. It is in fact, a medicine, being advertised as such, and one of its components, chlorate of potash, being admitted to be a medicine.

Herschell, Q.C., and *E. Brodie Cooper*, for the defendant. The effect of the contention for the Crown would be that, if the legislature had repealed the Act with regard to any one of the specific things named, such repeal would have been a nullity if the article came within the general words, for the duty would still be chargeable. This article comes within the definition in the schedule under the heading "waters," as it is used for compounding either an artificial mineral water or else water impregnated with soda or with carbonic acid gas. It therefore, at the time the Act passed, did not come within the schedule which refers to things other than those enumerated, and on the repeal of the general words applying to it it is no longer liable to duty.

Sir H. S. Giffard, S.G., in reply.

Cur. adv. vult.

June 18. HUDDLESTON, B. This was a case tried before my Brother Cleasby, when, upon the facts stated, a verdict was entered for the Crown. Mr. Herschell subsequently moved to set

aside that verdict pursuant to leave reserved, and to enter a verdict for the defendant, and the question was whether, having regard to 52 Geo. 3, c. 150, and 3 & 4 Wm. 4, c. 97, s. 20, an article called Lamplough's Pyretic Saline was liable to duty.

The argument urged by Mr. Herschell was that Lamplough's Pyretic Saline was only taxable to the government under the item "waters" in the schedule; and that, when those words were repealed, the effect would be that for the future Lamplough's Pyretic Saline might be sold without paying any duty, or without any stamp; and he urged that if Lamplough's Pyretic Saline was within those particular words, it could not be within the general words at the end of the schedule, and, therefore, when you excised the words which included it, you could not afterwards bring it within the general words, within which it might have been said to come, if the particular words had not been incorporated in the schedule. That was a very ingenious argument, but we have to consider what is the effect of the repealing statute, and I am of opinion that the effect of the repealing statute is, that those words, as they stand in the schedule to 52 Geo. 3, c. 150, are taken out of the schedule, and that after 1833 that statute was to be read in every respect as if those words were not in it. Mr. Herschell argued that supposing a statute passed in which the legislature took any specific item, Arquebusade water, for instance, out of the schedule, we ought not to hold that Arquebusade water would afterwards come within the words "all other pills, powders, waters," and so on. My answer is, if the legislature had intended to repeal the duty upon Arquebusade water, they would have said so in so many words: they would have said Arquebusade water is not to be liable to duty. If they do not choose to do that, then it must fall within the general rule I have mentioned. My view of the effect of a repealing statute is not without authority. I find, in the case of *Kay* v. *Godwin* (1), Tindal, C.J., says: "I take the effect of repealing a statute to be to obliterate it as completely from the records of parliament as if it had never existed; it must be considered as a law that never existed, except for the purposes of those actions which were commenced, prosecuted, and concluded while it was an existing law."

(1) 6 Bing. 576.

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That, I apprehend, would apply equally to words in a schedule which the legislature repeals. And there is also an authority in the case of *Surtees* v. *Ellison* (1), in which Lord Tenterden says: "It has been long established that when an Act of Parliament is repealed it must be considered, except as to transactions passed and closed, as if it had never existed." If, therefore, I look now at the effect of the present revised statute, I take it that these words "waters," and so on, are clearly out of the statute. Then it is quite obvious that Lamplough's Pyretic Saline would come within the general words of the schedule. But that is assuming that Lamplough's Pyretic Saline might have been included in the word "waters." I am by no means prepared to say that it is; on the contrary, I think that, prior to the statute of 1833, Lamplough's Pyretic Saline would not have come within those words "waters" and so on, but would have come within the general words; and if I am right in that view of the case, then clearly it would continue to be taxable. Lamplough's Pyretic Saline is a composition which consists of tartaric acid, bi-carbonate of soda, and chlorate of potash, in the following proportions: tartaric acid, 45·7; bi-carbonate of soda, 52·4; and chlorate of potash, 1·9. The chlorate of potash is a chemical salt, and it is not a constituent of natural mineral salts; it is used as a medicine for fevers, and that gives this article, as it is said, its medicinal character. It produces no part of the effervescence, which is produced by the mixture of tartaric acid and bi-carbonate of soda, evolving carbonic acid gas; but it is clearly to be looked upon in the nature of medicine, and when I see that it is advertised as efficacious in almost every species of ill that human flesh is heir to, I say it is a medicine made agreeable by the carbonic acid gas evolved by the mixture of acid and alkali; but it is nevertheless a medicine coming within the general words in the schedule, namely a nostrum or medicine recommended to the public by public notice, or advertisement, or by written or printed papers, or handbills, or by any label, or words written or printed affixed to or delivered with any packet, box, bottle, phial, and so on. Upon both these grounds I am of opinion that our judgment should be for the Crown.

(1) 9 B. & C. at p. 752.

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CLEASBY, B. I come to the same conclusion as my Brother Huddleston. The question is whether, under the Act of Parliament as it now stands, duty is chargeable upon this article? Taking the Act as it now stands and as it is now printed, with the part repealed struck out, and construing the words in the ordinary way, there is no doubt, as it appears to me, that duty is chargeable. It is argued that the effect of so dealing with the statute, and not looking to how it stood originally, would be that when a provision putting the duty on a particular article was repealed; if a specific item—for example, Ware's Asthmatic Drops—were taken out of the schedule by repeal, the duty would be revived by the general word "drops" in the schedule. It appears to me that this reasoning is faulty, because it assumes that the legislature would deal with a specific item like "Ware's Asthmatic Drops" by using the language of repeal, without doing more; whereas they might either enact that "Ware's Asthmatic Drops" should be no longer chargeable with duty, or if they used the language of repeal, they would say that nothing in the concluding part of the schedule should make it chargeable with duty. This particular item of "waters" appears to me to embrace two different things. "Waters" have been dealt with exceptionally before by the legislature, because it has been enacted by s. 4 of 52 Geo. 3, c. 150, that, as regards "waters" in the schedule sold to be drunk on the premises of victuallers, confectioners, &c., those shopkeepers need not have a licence, as they must for the other articles mentioned in the schedule, the only requirement being that the articles are to be sold with stamped bottles. It is sufficiently clear, then, that these waters to be drunk on the premises of victuallers and confectioners were regarded in the light of beverage-waters, which victuallers and confectioners would supply to be drunk on their own premises, and not, properly speaking, as medicinal waters for the cure of particular diseases. In dealing, therefore, with the words which come afterwards, that is to say, "waters impregnated with soda or mineral alkali or carbonic acid gas," and which would be such as would be sold by victuallers and confectioners to be drunk on the premises, the language of absolute repeal and striking them out of the statute altogether would be appropriate, because the word "other" would still retain

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the same meaning, and would include all correlative waters recommended as such, as distinguished from non-medicinal waters—that is to say, waters merely impregnated with soda or mineral alkali or with carbonic acid gas. Of course the argument depends on the legislature having made use of the word "repealed" in this case. The effect of a repeal of an enactment by the legislature has been pointed out in the authorities cited, which shew that generally, when the legislature repeals an enactment (and every clause is an enactment in an Act of Parliament), the effect is as completely to obliterate it from the records of parliament as if it had never passed.

There is an apparent difficulty raised, by suggesting that the result of giving this effect to the word "repealed" is really to give a different meaning to the word "other" in the general words of the schedule from that which it had before the repeal. There are two answers to this. First, I am by no means satisfied that a different meaning is in this case given to the word; but, secondly, I am satisfied that the legislature in this case have said that a different meaning is, if necessary, to be given to the word "other," when they obliterate from the Act of Parliament that general item of "waters" by terms of repeal. Seeing that the Act of Parliament is to be dealt with as it stands, I think that is the proper effect to be given to what the legislature have done, and, if so, I have no doubt whatever that our judgment ought to be for the Crown.

KELLY, C.B. I have the misfortune to differ from my learned Brethren in this case. The whole argument for the Crown appears to me to be based upon the confounding of two things essentially different. First, the confounding of an Act of Parliament with a particular clause in the Act of Parliament, and secondly, the confounding of one particular article or preparation with a class of articles or preparations. The state of the law appears to have been this down to the 29th of August, 1833. A duty was imposed on a great number of medicines and other articles, such as tooth powder and cosmetics, so that we ought not to regard the provisions of this Act of Parliament of 1812, and particularly the general words of the schedule, as referring to medicines only.

The first question which arises is, what is the effect of the two provisions taken together; the first with regard to the particular articles or classes of articles expressly specified to be liable to duty, and then the provision that all other articles are to be liable to duty which shall be by advertisement recommended to the public, and so forth. I cannot entertain a doubt that the articles made taxable by the general words of the schedule are different from the particular articles enumerated and specified in the schedule itself; otherwise I can give no effect whatever to the word "other."

But then it is contended that this article is not within the particular clause in the schedule commencing "waters, videlicet." It is said that although carbonic acid gas is evolved by the components of this article, it contains chlorate of potash, and so does not come within the definition of a composition used for the purpose of making a water impregnated with soda or with carbonic acid gas. I think, however, that though the water may be impregnated with forty other ingredients in a combined condition, or in a separate and distinct chemical condition, that cannot alter the effect of the words. What right have I to set aside those words, and treat them as if they were not within the Act of Parliament, because there is something besides carbonic acid gas which gives a different character to the soda, and which gives a different character to the carbonic acid gas? Upon that sort of speculation, by superadding words that are not in the Act of Parliament in question, the whole effect of the Act is to be done away with. I therefore hold that upon those clear and express words of the Act of Parliament, this being a composition used for the purpose of making a water impregnated with soda or carbonic acid gas, it was, by this Act of Parliament of 1812, one of the enumerated and specified articles made liable to duty, and therefore did not come within the general words. In dealing with the question, whether it comes within those general words, I ought to refer to s. 4 of the Act of 1812, which provides that confectioners and other dealers in articles of this description, who shall only sell any of the artificial or other waters mentioned in the schedule, to be drunk in their own houses or shops, need not take out a licence, provided the waters so sold are covered with stamped wrappers or

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labels. That may apply to some of these waters, but it only provides a species of immunity to a certain class of dealers in articles of this description, and would only qualify the enactment to that extent.

Then comes the repealing statute—though in saying repealing statute I follow the argument for the Crown a little too literally, because the counsel for the Crown invariably spoke of the Act of 1833 as if it repealed the former statute, and they confounded the word "statute" with a particular clause. This Act of Parliament of 1833 only repealed these words in the schedule, "waters, viz., all artificial mineral waters, and all waters impregnated with soda or mineral alkali or with carbonic acid gas," and so on. Now what was the effect of the repeal? I assume here that this article was taxable under the words "waters impregnated with soda or mineral alkali or with carbonic acid gas," because if it were not taxable under those words, I agree that it would be under the general words of the schedule; but we must assume that this article was then taxable under those words in the schedule, and that being so, what is the effect of the repeal? If anybody had told a person dealing in the particular article, "You have hitherto paid duty upon this article; here is an Act that cuts quite out of the schedule the whole of the words that apply to your preparation," of course he would say, "I am free."

Then comes the question what is the meaning of the general words—supposing that by the schedule it had been enacted that Warren's Analeptic Powders, Warren's British Tooth Powder, and all waters impregnated with soda should be liable to taxation, and supposing the liability to taxation on those three articles had been repealed by this 20th section of the Act of 1833, what would then have been the meaning of "and also all other?" The Crown must contend for this strange conclusion, they must contend for this construction of the Act of Parliament, that when by express terms a particular article is rendered ~~not~~ liable to duty it is at the same time liable to duty under another and general clause of the same Act of Parliament. It would be the same if it had happened to two or three of the tooth powder articles as to this particular article. Where an Act of Parliament repeals a clause, it is not that the Act of Parliament is repealed which

imposes the duty, but the clause of the Act of Parliament imposing the duty is repealed. We have only to substitute the word "clause" for "Act of Parliament," and then the dicta in *Surtees* v. *Ellison* (1), and *Kay* v. *Godwin* (2), apply, that where an Act of Parliament is repealed, the effect of the repeal is that it is to be taken as if the statute had never been enacted, except as to transactions begun or prosecuted while it was an existing law. Substitute, therefore, the word "clause" for "Act of Parliament," and this clause is to be taken as if it had never existed, and if that be so it must be taken as if those articles had never been taxed. What effect has that upon another and a totally different clause, which it is admitted applied before the repealing Act of Parliament to totally different subjects, which did not include the particular preparation in question? No judge ever laid down as law that where a particular clause in an Act of Parliament is repealed, the whole Act must be read as if that clause had never been enacted, all that can be said is that the clause is to be taken as if it never had been enacted, and if this clause had never been enacted, then no duty would ever have been imposed upon this article. Where an article has been expressly taxed, where it has been expressly enumerated and specified in the schedule, and where the provision relating to the particular article has been repealed, I cannot say that the moment the repeal took effect it gave a different meaning to another clause of the Act of Parliament, which taxes an additional and totally different description of articles. The repeal of that clause has indeed the effect of treating the clause of the Act of Parliament as if it had never been enacted, but the additional clause still remains what it was, that is to say, it relates to all descriptions of articles which are not enumerated. Taking the articles enumerated and specified which are liable to taxation, the result is that as to one of them the law has been repealed, and the article is no longer liable to taxation, but with regard to a thousand articles, the subject of another clause of the Act of Parliament, that clause remains in force, and it remains in force with the same meaning and the same effect that it had from 1812, when it was enacted. It does not include now, because it did not include then, and

(1) 9 B. & C. at p. 752. (2) 6 Bing. 576.

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there are no words in the Act of 1833 to make it include, the before specified and enumerated articles. The general clause of the Act of Parliament introduced by the words "and also all other pills, powders, 'waters,'" and so forth, applies to an additional and different class of articles. They were liable to taxation from the year 1812 to the year 1833, and are so at the present day.

I think, upon these grounds, that the article made and sold by the defendant was made liable to taxation by the Act of 1812—that that liability was put an end to by the Act of 1833, and that it then ceased to be liable to taxation. Looking at the fact that this is a question of taxation, when in express words the liability to taxation on a particular article is put an end to, and by express words repealed, to tell a man who deals in that article, "You are still liable, the repeal goes for nothing," appears to me to be something startling; and nothing but some inflexible rule of law would induce me to hold that such was the effect of this Act of Parliament.

On these grounds, I think our judgment ought to be against the Crown; but the majority of the Court being of the contrary opinion, the judgment will be in favour of the Crown.

Judgment for the Crown.

Jan. 23. The defendant appealed.

The facts and the arguments appear in the judgments.

Two questions were discussed. One of fact and law, whether the composition called pyretic saline was used for the purpose of producing a "water" within the meaning of the first part of the schedule to 52 Geo. 3, c. 150; the other of law only, whether, the first part of the schedule having been repealed by 3 & 4 Wm. 4, c. 97, s. 20, artificial mineral waters, &c., became taxable under the general words at the end of the schedule.

Herschell, Q.C., Ince, Q.C. (*Brodie Cooper* with them), for the defendant.

Sir H. S. Giffard, S.G., and *Dicey*, for the Crown.

BRAMWELL, L.J. This judgment must be reversed. I cannot agree with the majority of the Court below. The first question

which has been argued before us is, whether after the passing of the 52 Geo. 3, c. 150, this article would have been within the description in the schedule "waters, videlicet, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters." Now this composition is in a solid state, and we have to inquire, first, whether it is used for the purpose of making a water: and next, whether what is made from it is a water within that description. I confess for my part that I should have had very great difficulty in holding that it was. I can understand that it might be said, it is not properly called a water, it is something else; but from that difficulty my mind is relieved by the evidence of the witnesses for the Crown, who have said that which is made by the use of this composition is properly called a water impregnated with carbonic acid. That is what they have said; it may be wrong for all I know; our decision, however, will not prevent the Crown from filing a fresh information against the defendant, and getting better evidence upon that point if they please; but what those witnesses have said in so many words is that that which is made by the use of this composition is a water impregnated with carbonic acid. It may be, as I said before, that this is a wrong description, and it may be that this should not be called a water, but that it should be called a medicine, or that it should be called a potash draught, but the evidence is to the contrary. Then one of the learned Barons in the Court below said: it is not within the above description, because it is not only impregnated with carbonic acid gas, but it has something else in it. Now, with great respect, I cannot see how that prevents its being a "water" impregnated with carbonic acid gas. To say that it was not a water impregnated with carbonic acid gas because there was something else in it, is to my mind a mistake, and I hardly know how to deal with it otherwise than by saying—although there seems to be no legal reason that can be given—that it is not true as a fact that the thing is not impregnated with carbonic acid gas because it has got something else in it. Probably, I should think, it would be found that there was scarcely anything impregnated with carbonic acid

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gas which had not something else in it, and even in this particular case if the potash were to be omitted there would be, as I understand, in the water obtained from this composition, tartarate of soda, and some small quantity of bi-carbonate of soda. It seems to me that the witnesses for the Crown have shewn that what is made of this composition is a water impregnated with carbonic acid gas within the meaning of this particular clause in the section.

The next question that arises is with regard to the repeal of this part of the schedule. The question is does the Act which repeals the specific words of the schedule, cause the articles, which would have been within it, to come within what I may call the tail of the schedule. It must be admitted, that if that specific clause had not been in the schedule beginning "waters, videlicet," with what follows, this composition would have been within the tail of the schedule, because it would then have been a preparation which by public notice and advertisement was recommended as being useful for the cure of certain diseases and disorders; but the question has to be considered with regard to the specific enactment as well as the general one. It seems to me that the effect of the specific enactment, in conjunction with the general one, was that this article was taxable under the specific, or, as I would rather call it, the schedule enactment, and not under the general one; and I think that may be made manifest in this way; it reads "Waters, videlicet, all artificial mineral waters." I will stop there. An artificial mineral water therefore, would have been taxable whether it had been claimed under a patent, or whether the inventor claimed to have any occult mode of preparing it, or whether or not he said it was good for human diseases. By the operation of the schedule enactment, an artificial mineral water would have been taxed, whether it were or were not within any of the categories in the end of the schedule, and would consequently, not have been taxable by virtue of that which is in the end of the schedule, because it would have been taxable whether the end of the schedule were there or not; consequently, the end of the schedule would not have applied to it in any sense. I care very little about the use of the word "other," but I think I should come to the same conclusion if it were not there. The schedule enact-

ment would have taxed these things whether they were sold as patent medicines or not; therefore, the schedule might be read "waters, videlicet, all mineral waters whether sold under a patent or under exclusive claim of right to them or not, shall be taxable;" that is the meaning of the schedule. Then comes the repeal, which says, "so much of the schedule as is contained in the following words," all artificial mineral waters, and so forth, and you may read in there as you might before, "whether claimed to be sold under patent or not," shall be, and the same is hereby repealed. That is the true construction of the schedule, and it is the true construction of the repealing Act. The argument on the part of the Crown is, that although the repeal must be read thus, "the schedule enactment which makes artificial mineral waters taxable whether they are patent waters or not, is hereby repealed," nevertheless, if they are sold under letters patent they are still taxable. I take articles sold under letters patent as representing the whole class mentioned in the tail of the schedule. I think it plain that this argument is erroneous. I think that cannot be. The schedule, notwithstanding the repeal, taxes the articles whether they are patent or not; the end of the schedule taxes patent articles. The repealing Act says, "you shall not tax artificial mineral waters whether patent or not;" the Crown says that they come into the end of the schedule, because they are patent; it seems to me plain to demonstration that it is not so.

Then it is argued that you cannot look at the repealed portion of the Act of Parliament to see what is the meaning of what remains of the Act. I know that is not the argument of the Solicitor-General, but that opinion has been expressed. I, however, dissent from it; if it were an accurate opinion, this consequence would follow, that an Act of Parliament which at one time had one meaning would by the repeal of some one clause in it have some other meaning. Thus, a duty is imposed upon race-horses, carriage-horses, riding-horses, and all other horses, then if the Act is repealed as regards race-horses, it is said that nevertheless you must look at the Act as though the words imposing the tax on race-horses had never been in at all, and that you must take in race-horses under the words all "other horses." I will apply these observations not to this Act, but to another

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Act. Suppose there was another Act which said So and so shall be the law, and then there was a subsequent Act which said that the old Act should not apply to certain matters, but that a new law should be created, and that there was no particular naming of the matters, so that you could only make sense of the second Act by looking at the first: according to the argument which has been used you could not look at the first Act; you must really regard the words in the first Act as obliterated. I should say that where an Act of Parliament has been repealed it is as to all matters completed and ended at the time of its repeal, as though it had never existed as a governing law with respect to these subject-matters. Now of course we ought to interpret the words which are used, first by forming an opinion as to what the intention of the legislature was, and then whether the words bear it out. In this case the intention of the legislature was to exempt these waters from taxation, and not to subject them to taxation even if the vendor of them should think fit to say that they were good for all sorts of diseases, or that he had some sort of patent, or some occult mode of preparing them. The intention was to exempt the article from taxation under all circumstances; as the Solicitor-General says, the legislature might have made their meaning more plain; the legislature might have said the schedule relating to "waters, videlicet, all artificial," &c., is repealed, provided that nothing shall repeal so much of the end of the schedule as would make them liable to duty, looked at as waters sold under the claim of an exclusive right, and so forth, as stated in the end of the schedule. The legislature has not done so for this reason: It intended to exempt the article from taxation, and it intended to exempt it from taxation whether the person vending it should or should not say he did something with regard to it which would otherwise have brought it within the object of the schedule. I am therefore of opinion that this judgment cannot be sustained, and must be reversed and the appeal allowed.

BRETT, L.J. There are two main questions in this case. The first is, under what part of the schedule to 52 Geo. 3, c. 150, would the defendant's composition have been taxable; and the second is, what has been the effect of the repealing statute?

The first question is divided into two parts. The first is a question of fact, and the other is a question of the construction of the statute. As to the construction of the statute it must be construed as if we had to construe it the day after it was passed. It is a statute taxing certain medicinal and commercial articles, and it uses therefore either scientific or commercial terms, or both. Amongst these terms it uses this term "waters," but with a particular meaning attached to it, that is to say, not all waters, but particular waters, using commercial or scientific phrases with regard to them, now it says "waters, videlicet, all artificial mineral waters." I cannot help thinking that taking that to be the commercial or scientific phrase, the question would be what the great majority of ordinary commercial people dealing in such articles, both vendors and purchasers, or what the great majority of scientific people would call "artificial mineral waters." Any water made artificially, which would be understood by all ordinary commercial people dealing in such things, both vendors and purchasers, as an artificial mineral water would be within it; and so if that were what all ordinary scientific people would consider as artificial mineral water it would not be untaxable merely because formed of ingredients in different quantities from those in natural mineral waters. Then it seems to me that this specific clause of the schedule goes further and makes something taxable which would not be known as artificial mineral water, but something, which by the same people, and in the same sense, would be known commercially or scientifically as water impregnated with "soda," or water impregnated with "mineral alkali," or water impregnated with "carbonic acid gas."

We come to the remaining part of the schedule. With respect to calling it a schedule, a schedule in an Act of Parliament is a mere question of drafting—a mere question of words. The schedule is as much a part of the statute, and is as much an enactment as any other part. When a number of articles are specified, and after there is a general phrase at the end of the specific articles as there is here, that again is little more than a question as to convenience in drafting. When there are the words "all other things," it is only adding to the specifically named things other things which are not so specifically named; the things which

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come within the latter part of the schedule are different things from those which are specifically spoken of in the first part. The latter part is really just the same as if all the things which are proved finally to be within it had been specifically mentioned instead of being brought under the general phrase. If they had been specifically mentioned, it would be seen what precise effect the repealing of the statute would have with regard to them. So much for the construction of the first part of the schedule. Then comes the question under what part of it this composition comes. Now if this composition had resulted in that which ordinary people in dealing with it as a commercial matter would not have called a water impregnated with "carbonic acid gas," but which would have been called something else commercially or scientifically, I should have thought it was not within the specific part of the schedule, and so everybody at the trial and everybody on both arguments admitted. Then was this a composition which would, when used with water, produce not a water but something which everybody would call a medicine? It was suggested that that was admitted, but if it had been admitted it was impossible to suppose that any point could have been reserved in the case or that any argument could have taken place. I cannot help thinking that the point taken at the trial was this: that although the use of the composition did result in that which would be called by commercial or scientific people a water impregnated with carbonic acid gas, yet, as a matter of law, it was not so because a foreign substance was introduced into it. That was suggested on one side and commented on on the other, not as a question of fact, but as a question of law, the fact being undoubted and admitted. Therefore I take it that the admitted facts were these: that this composition when used with water did produce that which all ordinary commercial or all ordinary scientific people would call a water impregnated with carbonic acid gas, and that there was a foreign substance in it, and the argument was whether the mere fact of that foreign substance being in it, prevented it from being, as a matter of law, a water impregnated with carbonic acid gas, within this part of the schedule. I am of opinion that that cannot be so upon the construction which I have given to that part of the schedule, and therefore, notwithstanding the presence of that

foreign substance, it remains a water impregnated with carbonic acid gas within the meaning of that part of the schedule, and therefore would have been taxable under that part of the schedule before the passing of the repealing Act. If it was within that part of the schedule, then it was not within the subsequent part of the schedule, because the latter part does not apply to the waters which are within the specific enactment, but to other waters. But if this had produced, when used, something which ordinary people would not have called water impregnated with carbonic acid gas, then although there had been water in the result, and although there had been carbonic acid gas in the result, I should have thought that it would not have been within that first part of the schedule.

Then we come to the next question of law, viz., what is the effect of the repealing statute? The judgments of the majority in the Exchequer Division lay down that the moment an Act of Parliament is partly repealed we cannot look at the repealed part for any purpose, but that the repealed part must be regarded as if it had never been enacted. I cannot help thinking that that part of the judgments is not sustainable, for what we have to consider is not what was the construction of the first statute, but what is the effect of the repealing statute. We cannot tell what is the effect of the latter without looking at the meaning of the statute which it has repealed. We must treat it as we treat all statutes for the purpose of construing them; we must look at the facts which were existing at the time the Act passed to see what was its meaning. I do not say that the effect of repealing a portion of a statute can never be to alter the remaining portion of the statute, for supposing an Act of Parliament said that such and such specified things shall not be subject to duty, and the repealing statute were to strike out the word "not," and it were to say, "be it enacted that the word 'not' be repealed," it is obvious that then the effect of the repealing statute is to alter the former statute, and to give a different effect to it; but where in the statute which is to be repealed there are separate and distinct enactments, and the repealing statute simply repeals one of those enactments, it seems impossible to construe the meaning of the repealing statute to be that it thereby gives a different meaning to the enactments

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with which it does not assume to deal at all. I think that the two enactments in the first statute are two separate and distinct enactments: the one is with regard to specified waters; the other is with regard to "other waters." Then, the repealing statute repeals one of those enactments, and it is suggested that it thereby alters the meaning and effective application of the other separate and distinct enactment to which it does not refer. I think that is a wrong mode of construing, and that cannot be the intention of the legislature. At all events, it is not in effect that which the legislature has done; and where the legislature by its language deals with one enactment only, which is a separate and distinct enactment from the one called in question, it is a wrong mode of construction to say that the repealing statute has any effect whatever, either as to the construction or the application of the independent enactment.

For these reasons I think that the judgment of the Court below must be reversed.

COTTON, L.J. I think the judgment cannot be maintained. In this case the Crown claims duty upon the ground that the defendant is selling a composition used for making a water which is advertised in a printed paper wrapt round the bottle in which the composition is sold, and described as being beneficial for a variety of diseases. The question is whether or no, upon the construction of the Act of Parliament with which we have to deal, the composition comes within that which has been called the tail of the schedule. I will deal presently with the question of the effect of the repealing Act, but first I will deal with the construction of 52 Geo. 3 as it originally stood, and, curiously enough, we see the parties placed in this position: that the defendant is saying, "I was taxable under a particular part of this section," and the Crown saying, "No, you would not have been taxable under that." The question then is, whether a certain specified portion of what is called the schedule, as distinguished from the tail of the schedule, did or did not include this particular composition. What is called the tail begins in this way: "Also all other pills, powders," and things which are sold in the way in which this is sold. Treating this as a matter of construction, without

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reference to the question whether it was imposing a tax upon anybody or anything else, I should say that the tail of the schedule intends, as a matter of description, to include and refer to something additional to that described in the previous part of the schedule; and the question therefore arises, is or is not this preparation, as a matter of description, within the previous part of the schedule? if not, it comes within the tail. The description in the schedule is this: "Waters, videlicet, all artificial mineral waters and all waters impregnated with soda or mineral alkali or with carbonic acid gas, and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters." The argument has been, and I rather think some of the judgments in the Court below went upon this, that although the draught in the tumbler of water, into which this composition is poured, does become water impregnated with carbonic acid gas, it is not within what is described in this part of the schedule, because there is another ingredient in it which may have or has a certain medicinal effect. As a matter of law, it is wrong to say that a water ceases to be within the description of this particular schedule, a water impregnated with carbonic acid gas, either because it has a medicinal effect or because it contains some other substance besides that which causes the impregnation with carbonic acid gas. With regard to the question as to its being medicinal. This Act was primarily intended to deal with medicines, and in my opinion it is clear that these mineral and carbonic acid gas waters, if they came within the description in the schedule, would come within it although they had medicinal qualities; I should say that this description was pointed at that which was medicinal, but also, no doubt, included besides that which was not medicinal or intended to be such; that which from its being within the description of a water impregnated with "carbonic acid gas" was taxable, although it was to be used as a beverage. Therefore I think it cannot be said that the water in question does not come within the description in the body of the schedule. In fact, one of the witnesses for the Crown describes a mineral water as that which has medicinal properties. But does the addition of something else prevent it from coming within the description in the schedule? decidedly not; and if this particular

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portion had not been repealed, it could never have been held that a mixture for the purpose of making a water impregnated with carbonic acid gas was free from taxation, because it had in it two per cent. of something else which was not used for the purpose of making carbonic acid gas. The question is this: whether it can be said that in substance this water is a carbonic acid gas water? that is to say, aërated water as it is usually called. If in substance it is not, but something else, then it would not be within the first part of the schedule; that is a question upon which there should have been evidence submitted to the jury, if it had been intended to contend that this water is not aërated water but in substance something else.

I think that this composition, on the construction of the Act of Parliament, comes within the words "waters, videlicet," &c., in the body of the schedule and not within the tail of the schedule. Then, what is the effect of the repealing statute? The statute repealing that part of the schedule does so in rather awkward terms. "So much of the said schedule as is contained in the following words, that is to say, as relates to waters, videlicet, shall be and is hereby repealed." The effect of this is that the portion of the schedule so repealed is no longer operative for the purpose of imposing any tax. But for the purpose of construing words of reference, that is, for the purpose of seeing what as a matter of construction is meant by the words in the tail of the schedule, "all other waters, &c.," I am of opinion that we must look at what goes before though no longer operative.

The result in my opinion is that, as a matter of construction, this composition came within the description in the body of the schedule which has been repealed, and not within the description in the tail of the schedule, and that the effect of the repealing statute is not to bring it within the tail of the schedule. If it is contended that the intention and effect of the repealing statute was to make these things not taxable if used or sold as beverages, but to tax them if used or sold as medicine; that is not in terms in the Act of Parliament, and if that was the intention, it ought to have been so stated by words effectual for the purpose. It is not only articles which are sold with wrappers round them describing them as useful to cure diseases, which are taxed under the tail of the

schedule: it taxes all things which come under the description of having heretofore in any way been held out by written advertisements as curing diseases, so that we should at once come to a great difficulty, if we came, as a matter of construction, to the conclusion that the effect of the repealing Act of Parliament is to make them taxable if sold as medicines, when they were not taxable if sold only as beverages. I think the defendant is not liable to the duty, and that the judgment must be reversed.

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Judgment reversed.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendant: *Crouch & Spencer.*

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A suit in a county court having been referred by the judge thereof to an arbitrator, under 9 & 10 Vict. c. 95, s. 77, and the arbitrator's award having been entered up as the judgment, an application was made to the judge to set aside the award, on the ground that the arbitrator had exceeded his jurisdiction by taking into consideration matters not referred to him. The judge having refused this application:—

Held, that the Court of Appeal had no jurisdiction, under 13 & 14 Vict. c. 61, s. 14, to entertain an application on appeal from the judge to set aside the award.

AN action having been brought in the county court of Shropshire was referred by the judge, with the consent of both parties, under the County Courts Act, 1846 (9 & 10 Vict. c. 95), s. 77 (1), to

(1) By 9 & 10 Vict. c. 95, s. 77, "The judge may in any case, with the consent of both parties to the suit, order the same with or without other matters within the jurisdiction of the Court in dispute between such parties to be referred to arbitration to such person or persons and in such manner and on such terms as he shall think reasonable and just; and such reference shall not be revocable by either party except by consent of the judge; and the award of the arbitrator or arbitrators or umpire shall be entered as the judgment in the cause, and shall be as binding and effectual to all intents as if given by the judge: provided that the judge may, if he think fit, on application to him at the first Court held after the expiration of one week after the entry

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the deputy registrar, who made his award in favour of the plaintiff for 44*l.* odd, and judgment was entered up accordingly for him for that amount. The defendant then applied to the county court judge under s. 77 to set aside the award, on the ground that the deputy registrar had taken into consideration matters and accounts not referred to him. The judge having refused the application, a rule nisi to set aside the award, on the ground, among others, that it was void, because it extended beyond the submission in the subject matter, was obtained in this Division, against which cause was shewn by

Jelf, for the plaintiff, who contended that this Court had no jurisdiction to hear the appeal. The Court called on

J. C. Lawrence, Q.C. (*Arthur Yates* with him), for the defendant, in support of the rule. The county court judge has, by 9 & 10 Vict. c. 95, s. 77, power to refer the cause with the consent of both parties and also, "if he think fit," to set aside the award. The expression "if he think fit" is the same as that used in giving the judge power to order a new trial under s. 80 of the same Act, on which question the right of appeal admittedly exists. The right of appeal is given by the County Courts Act, 1850 (13 & 14 Vict. c. 61), s. 14, and the refusal of the judge in the present case is a "determination or direction of the Court in point of law" within that section. (1)

PER CURIAM (Kelly, C.B., and Pollock, B.). On such interlocutory decisions as the present there is no appeal. The right of appeal is given by 13 & 14 Vict. c. 61, s. 14, which enables the

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of such award, set aside any such award so given as aforesaid, or may with the consent of both parties aforesaid revoke the reference or order another reference to be made in the manner aforesaid."

(1) By 13 & 14 Vict. c. 61, s. 14, "If either party in any cause of the amount to which jurisdiction is given to the county courts by this Act shall be dissatisfied with the determination or direction of the said Court in point of law or upon the admission or rejection of any evidence, such party may appeal from the same to any of the superior Courts of Common Law at Westminster . . . . . and the said Court of Appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party as the case may be, and may make such order with respect to the costs of the said appeal as such Court may think proper; and such orders shall be final."

Court of Appeal either to order a new trial, or to order judgment to be entered up for either party. No other jurisdiction is given. In the present case the Court cannot enter up judgment, and a new trial would be no remedy, the application being to set aside the award.

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Rule discharged with costs.

Solicitors for plaintiff: *Smith, Fawdon, & Low, for Phillips, Osborne, & Phillips, Shifnal.*

Solicitors for defendant: *Robinson & Preston, for J. Leake, Shifnal.*

DELMAR *v.* FREEMANTLE.

1878 *June* 5.

Practice—Rule or Order to shew cause in any Action—Notice of Motion—Ruling Sheriff to pay Money levied under Fi. Fa.—Judicature Act, 1873 *—Order LIII., rr.* 2, 3, 4.

A rule calling on a sheriff to shew cause why he should not pay to the plaintiff's solicitors the money levied under a fi. fa., is a rule or order to shew cause in an action within the meaning of Order LIII., Rule 2, and the application cannot be heard unless notice of motion has been given to the sheriff under Order LIII., Rules 3 and 4.

THE plaintiff having obtained judgment in this action, issued a writ of fi. fa. indorsed to levy the sum of 38*l.* 18*s.* 10*d.* debt and costs. The sheriff of Surrey having been ruled to return the writ, filed a return that he had levied the amount indorsed on the writ, but failed to pay the money. The plaintiff applied ex parte for a rule calling on the sheriff to shew cause why he should not pay the money to the plaintiff's solicitors. The affidavit in support was entitled in the action *Delmar* v. *Freemantle.*

McLeod Fullarton, for the plaintiff. This is not a rule or order to shew cause in an action, and therefore notice of motion need not be given under Order LIII., Rules 3 and 4.

[CLEASBY, B.:—Does not Order LIII., Rule 2, mean rules or orders calling on the parties to an action and who are before the Court? The sheriff, though an officer of the Court, is not a party to the action.]

Just so. The plaintiff might either bring an action against the sheriff for the amount or rule him to return it. Having chosen the

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latter remedy, the application is not in an action, and the practice is not altered by the Judicature Acts or rules.

KELLY, C.B. I think there is considerable difficulty in the terms of Order LIII., Rule 2, as to whether this really is a rule or order in an action. One test is, that the affidavit is entitled in the cause, the plaintiff in which issued execution, and now claims the payment of the money. It is, therefore, difficult to say that the rule now applied for, which must be entitled in the cause, is not in the action. I am inclined to think that the case is within Order LIII., Rule 2, and that notice of this motion must be given to the sheriff.

CLEASBY, B., concurred.

Rule refused. (1)

Solicitors for plaintiff: *Lewis, Munns, & Longden.*

May 18.

[IN THE COURT OF APPEAL.]

WEIR *v.* BELL AND OTHERS.

Company—Fraudulent Prospectus—Liability of Directors for Fraudulent Statement of Agent—Principal and Agent.

10 C.L.D. 511
Ex. Div. Cas.
3 Ex. D. 239
6 Q.B.D. 704
1 Q.B.D. 270

A company formed to work a mine was compelled from want of funds to cease working: money was then advanced to them by some of the directors, and amongst them Barnett and Baldwin. Afterwards, at a general meeting of the company, held in order, amongst other things, to provide for the existing deficit and for working expenses, the directors were authorized to issue debentures on such terms and for such amounts as they in their discretion might think fit. The directors accordingly authorized the secretary to employ a firm of brokers to place the debentures. The brokers prepared and issued a prospectus, bearing the names of Bell and others as directors, and containing statements as to the condition and prospects of the company, on the faith of which the plaintiff and others purchased debentures. The money thus raised was paid to the company's bankers, and part of it was applied by the directors on behalf of the company to repay the advances made by Barnett and Baldwin. The debentures having become worthless, the plaintiff brought an action for damages against Bell and others in

(1) In Trinity sittings the motion was renewed upon an affidavit that notice of the motion had been given to the sheriff, and no one appearing for the sheriff an order was made absolute in the terms prayed.

respect of the statements in the prospectus, some of which were alleged to be fraudulent.

The jury found that the prospectus contained statements of fact which were false to the knowledge of the brokers, and by which the plaintiff was induced to part with his money; that none of the false statements were made by Bell personally or by his authority; that the brokers had authority to issue a prospectus but no authority to include in it statements which were fraudulent; and that Bell derived no benefit from the money raised by the debentures:—

Held, by Cockburn, C.J., Bramwell and Brett, L.JJ., Cotton, L.J., dissenting, affirming the judgment of the Exchequer Division, that the defendant Bell was not liable.

By Cockburn, C.J., and Brett, L.J., on the ground that though a party as director to the receipt of money, the defendant Bell was not aware of the falsehood of the statements contained in the prospectus, and derived no personal benefit from the receipt of the money.

By Bramwell, L.J., that the defendant Bell had been guilty of no moral fraud, and not being the principal of the brokers could not be held to have impliedly undertaken for the absence of fraud in them in issuing the prospectus.

By Cotton, L.J., that the defendant Bell was liable in an action to the plaintiff, for it was his duty as director to ascertain whether the statements in the prospectus were true or false.

APPEAL from the judgment of the Exchequer Division in favour of the defendant Bell. (1)

Action against six directors of a company incorporated under the Companies Acts, 1862 and 1867, for damages sustained by the plaintiff, who had become a purchaser of debentures of the company, upon the faith of certain statements in a prospectus issued by the authority of the defendants, some of the statements being alleged to be false and fraudulent to the knowledge of the defendants. The debentures had since become worthless.

The facts and arguments are fully noticed in the judgments of the Court.

Feb. 26, 27; Mar. 2. *Sir H. S. Giffard, S.G., A. Charles, Q.C.* (*W. Barber* with them), for the plaintiff.

Digby Seymour, Q.C., and *Lumley Smith*, for the defendant Bell.

In addition to those mentioned in the Court below and in the judgments of the Court of Appeal, the following cases were cited: *Mersey Docks Trustees* v. *Gibbs* (2); dictum of Lord Campbell, *Wilde* v. *Gibson* (3); *New Brunswick and Canada Ry. Co.* v.

(1) Ante, 32.

(2) Law Rep. 1 H. L. 93.

(3) 1 H. L. C. at p. 615.

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Connybeare (1), opinions of Lord Westbury, at p. 725, of Lord Cranworth at p. 740, and of Lord Chelmsford at p. 749; *National Exchange Co.* v. *Drew* (2); *Davidson* v. *Tulloch* (3); *Brady* v. *Tod.* (4)

Cur. adv. vult.

May 18. The following judgments were delivered:—

COTTON, L.J. This is an appeal of the plaintiff from the decision of the Exchequer Division directing judgment to be entered for the defendant Bell. The action was brought against various directors of the Knightor, Treverbyn, and Resugga Hæmatite Iron Ore Mining Company, Limited, including Mr. Bell, and by it the plaintiff sought to recover damages which he alleges he sustained by reason of his being induced, by certain fraudulent misstatements in a prospectus issued by the authority of the defendants, to take from the company certain debentures.

On the 31st of October, 1873, Bell, who had for some time been a shareholder, became a director of the company. At this time the directors were desirous to raise money by the issue of debentures, and they had been authorized so to do by a special meeting held on the 29th of September, 1873.

Mr. Bell attended a meeting of the board held on the 5th of November, at which a resolution was passed authorizing either the solicitor or secretary to employ brokers to place the debentures.

Under this resolution, Messrs. Stewart & Lambe were employed as brokers to place the debentures, and they, acting without any express directions from Bell, prepared and issued the prospectus complained of. It set forth various statements as to the condition and prospects of the company, which have been found to be false. There can be no doubt that the plaintiff took his debentures on the faith of these statements. The defendant Bell had before the meeting of the 5th of November seen a report and balance sheet, the statements of which, especially a statement in the report that the works had been suspended since the 1st of January, 1873, shewed the untruth of those representations in the prospectus, which have been found to be false and fraudulent. The defendant

(1) 9 H. L. C. 711; 31 L. J. (Ch.) 297.

(2) 2 Macq. at pp. 124, 126, 127.

(3) 3 Macq. 783.

(4) 9 C. B. (N.S.) 592; 30 L. J. (C.P.) 223.

Bell went abroad shortly after the board meeting of the 5th of November, but he returned to England before the debentures purchased by the plaintiff were allotted to him, and was present at the meeting of the board at which debentures, including those held by the plaintiff, were allotted. The jury found that Mr. Bell was not guilty of any personal fraud, that he derived no benefit from the money raised by the debentures, and that Messrs. Stewart & Lambe the brokers were his agents in respect of the statements in the prospectus which, as I understand the finding, means that the brokers had authority from Mr. Bell to issue a prospectus, but no express authority to include therein the statements which are found to be fraudulent. On these findings, the Exchequer Division held that Mr. Bell was not liable to the plaintiff, and the question is whether that judgment can be maintained.

It is urged on behalf of Mr. Bell that he never saw the prospectus in question, that the brokers were servants of the company, and not of himself or of the other directors, and that in the absence of any personal knowledge on his part of the fraudulent statements, though the company as the principal of the brokers might be made liable, he cannot be. The judgment of the Exchequer Division, so far as it refers to the case of Mr. Bell, is very short. It states that the finding of the jury that the brokers were his agents in making the statements, was contrary to the evidence, and therefore directed judgment to be entered for Mr. Bell; and they apparently did so on the ground, considered at much length in the previous part of their judgment, that the brokers were acting in the matter as servants or agents of the company, and that the company as principals, and not the directors, must be answerable for their misstatements. I cannot agree with this opinion. Even if the company could in an action of deceit be held liable for the misstatements in the prospectus, on which I express no opinion, it was part of the duty of the directors to issue the debentures, and I am of opinion that the brokers in preparing and issuing the prospectus must be considered as discharging for the directors part of the duty confided to them by the resolution authorizing the issue of the debentures, that is, as acting for the directors in making the statements contained in the prospectus. This was the finding of the jury, which in my opinion was not either contrary

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to the evidence or without evidence to support it. When we look at the prospectus, it does not purport to be the prospectus of the brokers. It states that the directors were prepared to receive applications for the debentures, and annexed to it is a form of application addressed to the directors, and referring to the prospectus, and the defendant Bell, together with the other directors, acted on this in allotting the debentures.

The prospectus must, in my opinion, be considered as the statements of the directors. It is true that Mr. Bell did not see the prospectus, but in November, whilst he was abroad, he learnt from an advertisement in a newspaper that a prospectus had been issued, and though that advertisement does not contain the statements of the prospectus which have been found to be fraudulent, it gives the summary of the prospectus, which in my opinion ought to have put Mr. Bell on inquiry, knowing as he did the actual state of the company, as to the contents of the prospectus. He certainly knew that the debentures would be applied for in reliance on the statements contained in the prospectus, and in my opinion it was under the circumstances his duty to ascertain what those statements were. He neglected this duty; had he looked at the prospectus he would have seen that material statements were untrue. It is well established that in an action of deceit a defendant may be liable not only if he has made statements which he knows to be false, but if he has made statements which in fact are untrue, recklessly; that is, without any reasonable grounds for believing them to be true, or under circumstances which shew that he was careless whether they were in fact true or false. On the same principle, in my opinion, if a defendant has employed an agent to issue a prospectus or other document on the statements of which persons are invited to contract, he will be liable to those who act to their prejudice on reliance on false statements made in this document, if he knew facts which shewed the untruth of those statements, but was so careless as to the representations made by his agent as not to do, what in my opinion it was his duty to do, viz., to look at the document issued by his authority. This view is supported by Lord Chelmsford in moving the judgment of the House of Lords in *Peek* v. *Gurney* (1), as to the case of Mr. Barclay.

(1) Law Rep. 6 H. L. at p. 392.

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In my opinion, therefore, judgment in the action ought to have been against Mr. Bell.

BRAMWELL, L.J. I think that the judgment for the defendant Bell should be affirmed. I think I clearly understand the findings of the jury, and I agree with them. They acquit the defendant Bell of actual fraud, that is to say, of knowledge of the contents of the prospectus combined with knowledge of those facts that make it false; but they say that he, as one of the directors, having authorized the raising of money on debentures, authorized its being done in the usual way; that issuing prospectuses is usual, and so he authorized the issuing of prospectuses, and in that way of the one actually issued. On these findings the question turns. There is no motion for a new trial. Nor do I think there would be ground for one if there was. That the defendant was acting bonâ fide cannot, I think, be doubted. We must, therefore, act on the finding of the jury. The defendant, then, is not actually guilty of this fraud. He did not commit it himself, nor procure its commission knowingly. Had he done so he would have been liable, whether as director, manager, printer of the prospectus, or entire stranger to the company, and acting merely from mischievous love of roguery. But this is not the case.

I am of opinion, with an exception I will presently advert to, that to make a man liable for fraud, moral fraud must be proved against him. I do not understand legal fraud. To my mind it has no more meaning than legal heat or legal cold, legal light or legal shade. There never can be a well-founded complaint of legal fraud, or of anything else, except where some duty is shewn and correlative right, and some violation of that duty and right. And when these exist it is much better that they should be stated and acted on, than that recourse should be had to a phrase illogical and unmeaning with the consequent uncertainty. I see no such right and duty here, nor any ground for saying they exist. But it is said that they do, that there is an exception, the one above referred to, to the rule that a man is only liable for fraud when it is actual fraud, and that though not morally fraudulent himself, he is in some cases liable for the fraud of his agent; and for this *Barwick* v. *English Joint Stock Bank* (1) and the cases

(1) Law Rep. 2 Ex. 259.

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following them are cited. I am not going to say that case is not law. In the first place, we are bound by it. In the next, it has been so much approved and followed, that it has become part of the law, and, lastly, it is undoubtedly a most useful and convenient rule that principals should be responsible for damages occasioned by the fraud of their agents acting within the scope of their authority, at least to the extent of the gains of the principal, especially now that so much of the world's business is carried on by corporations. But, with all respect be it said, the reasoning in *Barwick* v. *English Joint Stock Bank* (1) is not satisfactory. Willes, J., says: On the question "whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong." Now, with very great submission, there is a very obvious distinction. Fraud is always wilful, and a master as a rule is not liable for the wilful wrong of his servant. "The general rule," proceeds the learned judge, "is that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted on every day in running down cases." The illustration is unfortunate, for it is certain that there is no such liability where the act of the servant is wilful. He then cites *Ewbank* v. *Nutting* (2), where the owner of a ship was held liable for a tortious conversion by the captain of part of the cargo by selling it. That case, however, was expressly decided on the ground that the captain was acting for the owner within the scope of his authority. A similar remark applies to the next case cited. The principle that governs such cases as these is not that the master is liable for the acts of his servant. It is the liability of principal for the acts of his agent. For suppose the defendants had not been a joint stock company but a private partnership, they would (if the decision is right) have been liable; and suppose the fraud had been committed by one of the firm, surely the other partners would have been liable. It seems to me then that *Barwick* v. *English Joint Stock Bank* (1) cannot be supported on the reasons given. It is also remarkable

(1) Law Rep. 2 Ex. 259. (2) 7 C. B. 797.

that the counsel for the plaintiff in that case, in his opening, referred to cases in equity only in supporting his proposition. There is a suspicious air of novelty in the decision. It is always prominently put forward in subsequent cases. But though doubting the reasoning on which it is founded (if one may say so without presumption) I think it may be supported on other grounds. It is important to put the case on its true ground. I think that every person who authorizes another to act for him in the making of any contract, undertakes for the absence of fraud in that person in the execution of the authority given, as much as he undertakes for its absence in himself when he makes the contract. I retain the opinion I expressed in *Udell* v. *Atherton* (1), and mean what I say now to be consistent with it. Has this defendant so undertaken for the absence of fraud in those who prepared and issued this prospectus? I think not. The company has. The company is subject to actions to recover the money paid to it or to recover damages for the frauds in question. The defendant had undertaken nothing. Respondent superior. The defendant is not superior. If he is, he is either joint principal with the company, which is impossible, or he and the directors are one principal and the company a second principal, which is equally impossible.

I need not say that I think none of the other cases founded on *Barwick* v. *English Joint Stock Bank* (2) inconsistent with this; on the contrary, the principle I have ventured to suggest would support them all. I wish to add, that assuming *Barwick* v. *English Joint Stock Bank* (2) to be rightly decided and on right principles, it does not for the reasons above given, include the present case. I am of opinion that the judgment should be affirmed.

COCKBURN, C.J. This is an appeal from a judgment of the Exchequer Division, in an action brought by the plaintiff against several defendants, and amongst them against Mr. Valentine Grame Bell, as directors of the Knightor, Treverbyn, and Resugga Hæmatite Iron Ore Mining Company, Limited, to recover a sum of 700*l.* advanced by him to the said company on debentures, on the ground that he had been led to advance the money on

(1) 7 H. & N. 172; 30 L. J. (Ex.) 337. (2) Law Rep. 2 Ex. 259.

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the faith of statements contained in a prospectus issued by the authority of the defendants, which statements were false and fraudulent. Judgment having been given in the Exchequer Division in favour of the defendants, this appeal is brought against that decision so far as it relates to the defendant Bell alone; but it is impossible to dispose of Bell's case without referring to the facts and the law as affecting the defendants generally.

We must take it, on the findings of the jury, that certain material statements contained in the prospectus—such as the amount of capital stated to have been subscribed—that the mine was in working order—that its actual yield amounted to 160 tons per week from one shaft, to which two other shafts were about to be added—that the property was worth 30,000*l.*, and could be sold at any time for that amount—that the money proposed to be raised on debentures would be used in the development of the property—were false; as also that it was on the faith of these statements that the plaintiff had been led to advance his money. Under these circumstances there can be no doubt that the plaintiff would be entitled to recover back his money from the company. The question here is, 1st, whether he can recover it from the directors as having authorized the issuing of the prospectus, although they were not cognisant of the false statements contained in it; 2ndly, whether, independently of this general ground, the defendants, and more especially the defendant Bell, have by their individual conduct rendered themselves liable to the plaintiff.

The facts are these. The company had been formed in 1872; but in January, 1873, it was compelled to cease working from want of funds. Between that time and the ensuing month of August, money was advanced by the defendants (with the exception of the defendant Bell), then being directors of the company, and ore but to a small extent only was raised. At the annual general meeting of the company held on the 29th of September, 1873, the directors were authorized to raise money on debentures; and at a subsequent meeting of the directors held on the 8th of October, it was agreed that the defendants, Baldwin and Furnival, should make further advances for taking up certain bills, and that the repayment of these, and of the former advances made by defendants, should be made out of the proceeds of the deben-

tures to be issued. At a meeting of the directors of the 5th of November, it was resolved that "the secretary be authorized to employ brokers to place debentures to produce 10,000*l.*, at a discount of 5 per cent., and a commission not exceeding 1 per cent.;" and acting on this authority the secretary employed Stewart & Lambe, who are brokers, to place the debentures; and they, without express authority, but as it seems in the ordinary course of business adopted on such occasions, published the prospectus, which was prepared by their clerk—on what instructions or information does not appear—and which contained the misrepresentations complained of. The money raised on the debentures was paid into the company's bankers, and part of it was applied to the repayment of the advances which had been made by the defendants with the exception of Bell. In the sequel the company was unable to go on, and in January, 1875, was wound up.

Upon these facts the Court of Exchequer Division gave judgment in favour of the defendants, on the ground that Stewart & Lambe, the brokers, in issuing the prospectus, had acted as the agents, not of the defendants, but of the company; that the directors had been merely the officers and agents of the company in carrying into effect the resolution of the company that debentures should be issued; and in doing what was necessary for that purpose, inter alia in directing that a prospectus should be prepared and published, had been in no sense principals: consequently that the rule, that a principal who derives benefit from a fraud committed by his agent in the course of his employment becomes liable to a party injured by the fraud, has here no application, though upon the authority of *Barwick* v. *English Joint Stock Bank* (1), the fraud in question would have made the company liable, had the action been brought against them.

I concur in the view that the defendants, in what they did, were acting as the agents of the company, and not as principals, and therefore that they would not be liable, generally speaking, for misrepresentations made without their authority by persons employed by them on behalf of the company, and who in such employment were acting, not as their agents, but as the agents of the company. But the Court below appear to have overlooked a cir-

(1) Law Rep. 2 Ex. 259.

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cumstance which, as it seems to me, makes all the difference—namely, that, with the exception of the defendant Bell, all the defendants, though not parties to the issuing of the prospectus as fraudulently framed, yet knowing that it had been issued, and with the knowledge of its fraudulent character, which their perfect acquaintance with the affairs of the company must have given them, not only allowed the plaintiff and others to advance their money on the faith of the false representations contained in it, and by receiving the money became parties to the fraud, but, on their own authority, applied a considerable portion of the money so received to the discharge of their own pecuniary claims on the company, claims which the company had no other means whatever of satisfying. Even the defendant Barnett, who left England in August, 1873, and did not return till 1874, and who was ignorant of all that was done in the interval, inclusive even of the fact of the payment of the amount due to him from the company, the money having been paid to his agents in his absence, having retained the money when the facts came to his knowledge, stands on the same footing with the rest.

Now I take it to be undoubted law that, if an agent in the course of his employment commits a fraud upon another party, whereby damage ensues to the latter, he will be liable to the party wronged, though his principal would be so likewise. The case of *Henderson* v. *Lacon* (1) proceeded on this principle. And in *Cullen* v. *Thompson's Trustees* (2) Lord Westbury says, "All persons concerned in the commission of a fraud are to be treated as principals; no party can be permitted to excuse himself on the ground that he acted as the agent or servant of another." A fortiori, this would be so where the agent himself derives benefit from the fraud.

The present case differs, it is true, in this, that here the defendants, being the agents of the company, employed sub-agents to publish the prospectus, but were no parties to the fraudulent statements contained in it, such statements having been published by the sub-agents without their authority or knowledge. But having, with the exception of the defendant Bell, become aware of those statements, and being also aware of their falsehood, they

(1) Law Rep. 5 Eq. 249. (2) 4 Macq. 424.

were parties to the issuing of the debentures, and applied a considerable portion of the proceeds to the satisfaction of their own claims on the company.

Now I apprehend that where an agent employs a sub-agent, and the latter, in the course of his employment, is guilty of fraud or misrepresentation, and the agent, with knowledge of the fraud, derives a material benefit from it, the case becomes analogous to that of a principal who profits by the fraud of his agent, the principle being that he who profits by the fraud of one who is acting by his authority, though committed without his authority, adopts the act of the agent, and becomes responsible to the party who has been imposed upon and has sustained damage by reason of it.

If, therefore, the case of the defendant Bell, with which alone we have to deal—as it is only against the decision of the Court below in his favour that the present appeal has been brought—had been undistinguishable from that of the other defendants, I should not have felt warranted in affirming the decision. But his case differs from that of the other defendants in two most important particulars. First, that though party to the receipt of the plaintiff's money, he does not appear to have been at that time acquainted with the real state of the company's affairs, and thus aware of the falsehood of the statements contained in the prospectus; secondly, that none of the money actually came into his pocket.

It appears that Mr. Bell became a shareholder in the company at the instigation of the defendant Barnett in June, 1872, under a belief that the concern would be a successful one. He took 100 shares, and paid 1000*l*. He attended the general meeting on the 29th of September, 1873, at which it was resolved to raise money on debentures, and on the 31st of October he became a director of the company. He was no party to the arrangement of the 8th of October, at which it was resolved to repay the advances made by the directors out of the money to be raised by the issue of debentures. He was present, as director, at the meeting of the 5th of November, at which the secretary was authorized to employ brokers to place the shares; and, as it appears that in the ordinary course of business it would be incidental

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to such employment that the brokers should issue a prospectus, the jury may have been warranted in finding that by joining in that resolution he constituted the brokers his agents to issue a prospectus. But of the prospectus as published he knew nothing till some time after its publication. He left London for the Continent on the evening of the 5th of November, and did not return till the 25th, the prospectus having been issued, without his knowledge, in the interval. He was no party, directly or indirectly, to the statements contained in it. He, of course, became aware of the prospectus afterwards, and knowing the statements contained in it, was a party to the receipt of the plaintiff's money on the 26th of November. But it does not appear that he was then aware of the real state of the company's affairs. He swore on the trial that he had no such knowledge beyond what was afforded by the reports of the company's engineer produced at the meeting of the 29th of September—reports which did not disclose the true state of affairs—and that when he became aware of the statements put forth in the prospectus he had no reason to believe them to be untrue; and there was no evidence to rebut his statement. I cannot, therefore, say that he was guilty of fraud in receiving the plaintiff's money on behalf of the company; and, as has been already stated, he derived personally no benefit from the receipt of it.

In the result Bell has been guilty of no fraud; he is not a principal deriving a benefit from a fraud committed by his agent procuring that benefit; nor, indeed, has he derived any benefit from the fraud committed by the sub-agents whom he was authorized to employ on behalf of the company. Upon this state of facts I think the plaintiff fails to establish the liability of the defendant Bell. While, therefore, I am unable to adopt the grounds on which the judgment of the Exchequer Division is based, I am of opinion that, on the special grounds to which I have referred, that judgment in the case of the defendant Bell should be upheld and this appeal dismissed.

My Brother Brett concurs in this judgment.

Judgment affirmed.

Solicitor for plaintiff: *Fox.*

Solicitors for *Bell*: *G. S. & H. Brandon.*

[IN THE COURT OF APPEAL.]

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July 2.

BERDAN *v.* GREENWOOD AND ANOTHER.

Rules of the Supreme Court, Order XXVII., r. 1; *Order XXX.—Pleading—Embarrassing Defence—Payment into Court and Denial of Plaintiff's Causes of Action pleaded to same part of Statement of Claim.*

As a general rule, a defendant may by his statement of defence deny the plaintiff's causes of action, and at the same time plead payment into Court in respect of the whole or any part of them.

Quære, whether the general rule above mentioned may under special circumstances include actions brought to try a right of or in respect of property which is denied, or to establish character which has been assailed, and actions where the plaintiff is by the statement of defence charged with fraud.

Quære, whether *Spurr* v. *Hall* (2 Q. B. D. 615) was correctly decided.

APPEAL from a decision of the Exchequer Division, affirming an order of Field, J. (1)

(1) In the Exchequer Division.

April 15. *Shortt* for the plaintiff:—*Herschell, Q.C.*, and *R. V. Williams* for the defendant:—

HUDDLESTON, B. I have felt some hesitation in deciding this case; not indeed on the question whether payment into court ought to be allowed, together with a plea of fraud, for that I think would prejudice and embarrass the fair trial of the action, and I feel satisfied that upon that ground the order of Field, J., was right. But we must meet the other question, which is whether a defendant can now pay money into court together with a defence of the general issue. There are no provisions in the Judicature Acts or Rules, which specifically allow him to do so. Sect. 21 of the Judicature Act of 1875 provides that all forms and methods of procedure which are not inconsistent with the Acts or Rules are to continue as before. Therefore, if there were nothing more, the old rule would prevail that payment into court cannot be pleaded with the general issue. The practice as to payment into court in satisfaction is regulated by Order XXX. Rule 1 provides that, in any action to recover a debt or damages, the defendant may pay money into court by way of satisfaction or amends; and Rule 4 provides that the plaintiff may accept the same in satisfaction of the causes of action in respect of which it is paid in; and "in case the sum paid in is accepted in satisfaction of the *entire* cause of action," may tax his costs. In the present case the plaintiff must either accept the 130*l.* in satisfaction of his entire cause of action in which case he admits that he is entitled to no more; or he must prove the contract and breach, and that his damages are more than 130*l.* I think that places the plaintiff in some difficulty. Under Order XXVII, Rule 1, the Court or judge has power to strike out any matter in the pleadings, which "may be scandalous or may tend to

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Writ issued the 2nd of February, 1878.

Action to recover 5512*l.* 12*s.* 6*d.* alleged to be due to the plaintiff as commission upon orders received by the defendant from the Russian Government for machines, tools, fixtures, gauges, &c., for manufacturing the plaintiff's guns. The statement of defence was delivered on behalf of the defendant John Batley.

The pleadings, facts, and arguments are sufficiently stated in the judgment delivered by Thesiger, L.J.

May 8, 9. *Mellor, Q.C.*, and *J. S. Dugdale* (*Shortt* with them), for the plaintiff.

Herschell, Q.C., and *R. V. Williams*, for the defendant.

Cur. adv. vult.

July 2. The following judgments were read.

THESIGER, L.J. In this case, which was heard before Lords Justices Brett and Cotton and myself, I have to deliver the judgment of Lord Justice Brett and myself.

The plaintiff, by his statement of claim, alleges that he is the inventor of the Berdan rifle; that in the year 1869 he was in Russia and in communication with the Russian Government respecting the manufacture of his guns and rifles, and that the defendant's firm were endeavouring to obtain from the same government orders for the manufacturing and supplying to it of machines, &c., necessary for the making of the said guns and

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prejudice, embarrass, or delay the fair trial of the action."

Though the decision in *Spurr* v. *Hall* (2 Q. B. D. 615) proceeded on facts which are distinguishable from the present, I think it is to some extent an authority, and that we ought not to go in the teeth of it. The question ought to be determined by the Court of Appeal, which can review *Spurr* v. *Hall* (2 Q. B. D. 615) and its own decision in *Potter* v. *Home and Colonial Insurance Company* (cited 2 Q. B. D. 622) where the point now in question was not argued. I think, therefore, that the order of Field, J., ought to be upheld.

MANISTY, J. I have no doubt that a plea of fraud ought not to be pleaded together with payment into court. As to the point whether a defendant may deny the whole cause of action and pay money into court, I think that question is determined by the authority of *Spurr* v. *Hall*, (2 Q. B. D. 615) and that we ought to decide in accordance with it.

Appeal dismissed.

rifles, that, therefore, in consideration that the plaintiff would use his influence with the government to prevent an order being given to any parties for machines to make his guns in Tula (other than as excepted) until a person or commission visited England about the business, the defendant's firm, by a letter signed by one George Greenwood, then a member of the firm, agreed to pay a commission of 5 per cent. on all orders received through him, or directly from the Russian Government, for such machines, &c., as aforesaid, for three years from the date of the agreement; that the defendant received and executed such orders to a large amount; that all conditions precedent were performed necessary to entitle the plaintiff to recover the agreed commission, and concludes by claiming a sum of over 5000*l.*

The statement of defence, as originally delivered, denied that George Greenwood was ever a member of, or that he had any authority to bind the firm by the letter constituting the alleged agreement, or that his act in writing it was ever ratified or confirmed, or the offer thereby made ever assented to by the defendant, or that the plaintiff ever accepted such offer; and further alleged that if the agreement was made, the plaintiff never performed his part of it or used his influence with the Russian Government; that at the time of the agreement he knew that the government would not give any orders (other than those excepted) until a person or commission had visited England, and improperly and fraudulently suppressed that fact from George Greenwood. The defendant then put the plaintiff to the proof of the receipt or execution by him of any orders which were the subject of the agreement within three years from its date; alleged that the plaintiff's claim was barred by the Statute of Limitations; and that if the agreement was made he was induced to make it by the fraud of the plaintiff, and concluded by a payment into court made in these terms:—"Lest contrary to what the defendant believes and contends, he is under any liability to the plaintiff, he brings into court the sum of 130*l.*, and says that the said sum is enough to satisfy the plaintiff's claim in respect of the matters herein pleaded to."

The plaintiff objected to the payment into court, concurrently with the other defences to the same causes of action combined in

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the statement of defence. Mr. Justice Field, at chambers, made an order disallowing it, and the Exchequer Division upon appeal affirmed his order. The defendant thereupon appealed to this Court, but intimated at the same time his willingness to strike out of the statement of defence all the allegations of fraud, and when before us, by his counsel expressed the same willingness, and the case must be treated as if in point of fact, these allegations were struck out. That being so, two questions have been argued: the first, whether in any case, or in all cases under the Judicature Acts and Orders, a payment into court, at the same time that the cause of action in respect of which it is paid in is denied, should be allowed; the second, whether assuming such a payment to be in some but not in all cases proper, the present is one of those cases.

The first question is one of very great importance. The practice of judges at chambers, since the case of *Spurr* v. *Hall* (1) was decided, has been to disallow in all cases a payment into court, concurrent with paragraphs denying or traversing the cause of action in respect of which the payment is made, and in the present case, *Spurr* v. *Hall* (1) was treated in the Court below as an authority properly supporting that practice, although the learned judges expressly invited an appeal upon the point.

Payment of money into court originally existed in the shape of a rule to strike the sum paid in out of the damages, which rule it was necessary to prove at the trial. By the General Rules of Trinity Term 1 Vict., a plea of payment into court was substituted for the old practice. The question then arose, whether, inasmuch as the statute of 4 Anne, c. 16, s. 4, enabled a defendant, with leave of the Court, to plead as many several matters as he should think necessary for his defence, the plea of payment into court ought to be allowed, together with other pleas, to the same cause of action. A uniform practice thereupon sprang up, under which payment into court was only allowed to be pleaded, where the cause of action to, or in respect of, which it was made and pleaded, was not traversed, and was consequently admitted by the pleading. That practice was continued after the passing of the Common Law Procedure Act, 1852, s. 84, under which certain

(1) 2 Q. B. D. 615.

specified pleas (amongst which the plea of payment into court was not included), might be pleaded together without leave, while all pleas other than those specified had to be made the subject of leave of a judge, or of the court, if it was desired to join them with any other plea. The ground upon which this practice both before and after the Common Law Procedure Act, 1852, was based, was the inconsistency in the record, which, it was held, would arise if a plea of payment into court were joined with other defences to the same cause of action: see as bearing upon this point the cases *Key* v. *Thimbleby* (1); *Maclellan* v. *Howard* (2); *Jenkins* v. *Edwards.* (3)

In this state of circumstances, the Judicature Acts and Orders came into existence and swept away the old forms and practice of pleading, leaving it open to a defendant, as the general rule, to raise by his statement of defence without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision contained in Rule 1, Order XXVII., which is in these terms: "The court or a judge may, at any stage of the proceedings, allow either party to alter his statement of claim, or defence, or reply, or may order to be struck out or amended, any matter in such statements respectively, which may be scandalous, or which may tend to prejudice, embarrass, or delay, the fair trial of the action, and all such amendments shall be made as may be necessary for the purpose of determining the real questions or question in controversy between the parties." As regards, however, payment of money into court, special provision is made by Order XXX., and the Court has to see first, whether there is anything in the rules comprised in the last-mentioned order, which precludes a defendant from paying money into court in respect of a cause of action, the existence of which he at the same time denies. This point has not been in terms taken in argument before us, and was not made the ground of the decision in the Court below, but it is involved in the argument, and it is desirable to consider it as introductory to the consideration of the point arising upon Rule 1 of Order XXVII. It is suggested that money is not paid into court by way of satisfaction or amends,

(1) 6 Ex. 692, 694. (2) 4 T. R. 194.
(3) 5 T. R. 97.

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within the meaning of Rule 1 of Order XXX., when it is paid into court in respect of a claim or cause of action, which the defendant does not admit to exist in fact. Such an argument does not, however, appear to us well founded. The sum paid in is (as has been admitted on the part of the defendant's counsel to be the effect in this action), absolutely appropriated to the purpose of satisfaction or amends. The plaintiff may obtain the payment of it out to himself in manner provided by the third Rule of the Order under consideration, and may, either under Rule 4, accept it in satisfaction of the causes of action in respect of which it is paid in, and if he accept it in satisfaction of the entire cause of action, may tax his costs and sign judgment for the costs so taxed; or, if he think proper, may go on with the action for the purpose of recovering something more, in which event the issue, quoad the defence of payment into court, will be the same as it was before the coming into operation of the Judicature Acts, although there will be other issues going to the same cause of action which the tribunal by which the action is tried will have to determine. We are of opinion, therefore, that there is nothing in the rules comprised under Order XXX., which precludes a defendant from taking the course under consideration.

The question then arises whether the payment into court necessarily tends "to prejudice, embarrass, or delay the fair trial of the action" within the meaning of Rule 1 of Order XXVII. Now in considering this question we are disposed to give a liberal interpretation to the words "fair trial of the action," and to hold that a pleading, which tends to prejudice, embarrass, or delay the plaintiff at any stage of the proceedings in the action, not merely so as to prevent him from fairly trying at the actual trial of the action, but so as to prevent him from ever trying on fair terms the real issue between him and the defendant, the obtaining of a decision upon which is the legitimate object of the action, would affect the "fair trial" of the action within the meaning of the rule; but giving this interpretation to the rule, we are of opinion that in general such a payment into court as that under consideration has not the effect referred to, and ought to be allowed. That it works no practical inconvenience and leads to no necessarily embarrassing inconsistency in the record will be seen by con-

sidering what, if this course be adopted, will be the practical result of the trial of the action.

If the plaintiff fail at the trial to establish his causes of action, the judgment will be properly a general one for the defendant, for if there be no cause of action, it follows that the plaintiff cannot be entitled to recover anything more than that which the defendant has paid into court, and really ought not to have received any money at all. The record, therefore, only shews that the plaintiff has obtained, through the timidity of the defendant, something which he had no right to obtain. On the other hand, if the plaintiff establishes his cause of action and proves that the sum paid into court is not sufficient, or that he is entitled to some relief, such, for instance, as injunction, other than or over and above relief in damages, the judgment will be a general one for him. The only remaining alternative is that of the plaintiff succeeding in establishing his cause of action but failing to prove any damage beyond the sum paid into court, or to establish any title to relief other than in damages. In that event the issues upon the record will be duly found in accordance with the event, and will sufficiently explain themselves; the general judgment will be for the defendant, and unless the judge otherwise orders, pursuant to Rule 1, Order LV., the defendant will recover the general costs of the cause, while the plaintiff will be entitled to the costs of the particular issues found in his favour. Is there, then, anything inherently unjust in a defendant paying money into court in respect of a cause of action, which at the same time he by his pleadings denies to exist? As a general proposition we should answer nothing, while there is much to be said in favour of it. Is it just in principle as regards a defendant, who considers that he has a good defence on the merits, but who is desirous, if possible, of terminating litigation by a payment of money, that he should be forbidden to adopt this prudent course, except under the penalty of a complete admission of a cause of action which he honestly disputes, and with the consequent risk which would attend the trial of the action if the sole issue were as to the sufficiency of the amount paid in? On the other hand what is it, if such a course be taken, of which the plaintiff has to complain? In the great majority of actions, whether of contract or tort, it can hardly

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be suggested that he is in any more embarrassing predicament than that in which he would be placed in an ordinary case of a simple plea of payment into court, or in a case where inconsistent pleas, not including a plea of payment into court, are pleaded. In the latter case he must be prepared to meet the alternative defences, in the former he must judge whether it is advisable to proceed with the action at all. The combination of the plea of payment into court with other defences throws no burden greater in kind upon the plaintiff, although in degree it may somewhat enhance the difficulty of his position in regard to the course it is advisable for him to pursue.

It may, however, possibly be that in some actions brought to try a right of or in respect of property which is denied, or to establish character which has been assailed, and in actions where the plaintiff is by the statement of defence charged with fraud, and perhaps in some other cases it would be, as a matter of practice, improper to allow the defence of payment into court concurrently with other defences. It is not necessary for us to decide this point or to say whether, upon the case presented to the Queen's Bench Division in *Spurr* v. *Hall* (1), the decision arrived at was a proper one; but we wish to guard ourselves against being supposed to decide that, even in such actions as those to which we have alluded, the payment into court should not be allowed, and we may add that if in some actions the payment into court may tend to prejudice, embarrass, or delay the fair trial of the action, within the meaning of Order XXVII., Rule 1, the circumstances must at least be of a very special character to justify the courts in holding that a defendant is precluded from adopting a course which it is, as a general proposition, his legal right to adopt. In the present case, with the allegations of fraud withdrawn, the defence amounts to no more than the defendant's saying this: "I deny the existence of any contract between me and the plaintiff, or that, if a contract ever existed, any claim has properly arisen against me in respect of it. I allege that the Statute of Limitations is a bar to the action: but I am content to pay in any event a sum of 130*l.* in respect of any claim which might possibly be established against me; if that sum be accepted as sufficient, the

(1) 2 Q. B. D. 615.

litigation will terminate, but if not, then I will fall back upon my other defences, and the question of the sufficiency of what I have paid will only form one of my defences." What is there in such a course which tends "to prejudice, embarrass, or delay the fair trial of the action?" We think, nothing. To the lawyer's mind there is, no doubt, at first sight something anomalous in payment by way of satisfaction or amends in respect of a cause of action, the existence of which the defendant by his pleading denies; but the more we have considered the point, the stronger has become our conviction that there is nothing unreasonable or unjust, and nothing contrary to the letter or spirit of the Judicature Acts or Orders, in a defendant so acting; and we think that, apart from anything in the Judicature Acts or Orders to compel us to do so, no predilection in favour of the old theories of consistent records should induce us to preclude defendants in actions from saying and doing that which, as practical men, before the action they might reasonably say and do, namely, say that they entirely deny a person's right to sue them, yet pay, or offer to pay, a sum of money as the price of peace and for the prevention of further litigation.

For these reasons we think that the appeal should be allowed, and the order of the Court below reversed.

COTTON, L.J. The only question which we have to decide on this appeal is, whether the 11th paragraph of the statement of defence ought, under Order XXVII., Rule 1, to be struck out as tending "to prejudice, embarrass, or delay the fair trial of the action." I agree in the judgment of Lord Justice Thesiger that it ought not, even if this paragraph is to be considered as technically a plea of payment into court. But for the purposes of this judgment, I think it not necessary to hold that this is a plea of payment into court, within the 71st section of the Common Law Procedure Act, 1852. My opinion is that it is not; and I think it right so to state, because the question may hereafter arise whether if the plaintiff should proceed with this action, and, though he establish the right claimed by him in his action, should fail to prove damages beyond the sum paid into court, the defendant will be entitled to judgment and the costs of the action. Under the old form of pleading it was necessary that each plea

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should state only one ground of defence, and the plea of payment into court contemplated by the Common Law Procedure Act, 1852, necessarily was an admission on the record of the plaintiff's right on which the action was founded. But the 11th paragraph of the statement of defence states that the defendant does not admit any right on the part of the plaintiff. It is in substance this: "I do not admit that you have any claim against me, but for the sake of peace I am willing to pay you the sum which I have paid into court. If you do not take that in satisfaction, I shall contest not only the amount of damages but your right to bring any action." On such a statement being made the plaintiff must consider what the object of his action is, whether it is to establish a right or to obtain damages; and if the latter, whether it is probable that the amount offered is as much as he will probably obtain in the action. On the trial of the action, if the plaintiff establish his right in respect of which he sues, and the judge is satisfied that the action was brought to try a right, he may make a declaration establishing the plaintiff's right and give him costs, except those of any unsuccessful attempt to prove damages beyond the amount paid into court.

In this view of the defence, as the allegation of fraud has been withdrawn, I am of opinion that the paragraph in question cannot be considered as in any way tending "to prejudice, embarrass, or delay the fair trial of the action;" but there may be special cases in which this would be the effect, as in actions for libel, which the defendant by his statement of defence justifies. All I decide is that a statement of payment into court cannot be struck out because the defendant does not admit the plaintiff's right of action.

Appeal allowed.

Solicitors for plaintiff: *Whateley, Milward, & Whitehead, for Whateley, Milward, Balden, & Lee, Birmingham.*

Solicitors for defendants: *Van Sandau & Cumming, for Brook, Freeman, & Batley, Huddersfield.*

FIELD *v.* THE GREAT NORTHERN RAILWAY COMPANY. 1878 July 16.

Practice—Costs to "follow the event"—Costs of former Trial where new Trial had—Judicature Act, 1875, *Order LV.*

The event mentioned in Order LV. is the result of all the proceedings incidental to the litigation, and the costs which follow the event include the costs of all the stages of that litigation.

The plaintiff in an action recovered a verdict. The Court ordered a new trial, unless the plaintiff should consent to certain terms, but gave no direction as to costs. The plaintiff did not consent, and a new trial was had, when a verdict was entered for the plaintiff:—

Held, that the plaintiff was entitled to the costs of the first trial, as part of the costs of the action which, under Order LV., follow the event.

THIS was an action for personal injuries, in which the plaintiff recovered 750*l.* as damages. A rule was obtained by the defendants in the Exchequer Division for a new trial, on the ground that the damages were excessive. The Court ordered the rule to be made absolute, unless the plaintiff should consent to reduce the damages to 375*l.* No order was made as to costs.

The plaintiff refused to accept the reduced amount, and a second trial was had, when verdict and judgment were entered for the plaintiff by consent for 490*l.*

On taxation, the master refused to tax the costs of the first trial, and only allowed the plaintiff the costs of the rule and the second trial, and his decision was affirmed on appeal by the judge at chambers.

Bigham, for the plaintiff, moved to review the taxation. He cited *Creen* v. *Wright* (1), and referred to Order LV. of the Rules of Court.

F. M. White, Q.C., for the defendants, contrà. The old practice as to costs has not been expressly abolished, and therefore it remains in force, as is shewn by s. 21 of the Judicature Act, 1875, and the note at the head of the Rules of Court. Therefore, as no direction was given as to costs when the rule for the new trial was granted, the costs of the first trial must be considered to be thrown away, pursuant to the practice of Rule 54 of the Regulæ Generales of Hilary Term, 1853. It has been the practice to grant new trials on conditions, such as on the payment of the costs of the

(1) 2 C. P. D. 354.

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former trial, and in the absence of any condition these costs cannot be made costs against the defendants.

Here the first trial was an abortive trial; the verdict has been set aside; it must therefore be treated as if it had never been given, so that there was no event at all in that trial, and each party must pay his own costs. Or the first trial may be considered as analogous to an unsuccessful interlocutory application, and then the plaintiff's costs would not be made costs against the defendants.

KELLY, C.B. I am of opinion that the plaintiff is entitled to the costs of the former trial. This case is governed by Order LV., which seems to me to be clear and express, and we have only to consider what is the "event" in this case. It has been argued that the first trial was null and void, and had no event at all, and therefore that the costs of that trial are thrown away. I, however, think that the event which the costs follow is the conclusion of the whole matter or proceeding which commenced with the writ of summons and ended with the final judgment, and that the party who succeeds in his action is, in the absence of any special directions or orders, entitled to the whole costs of the entire action. I am clearly of opinion that this is the meaning of Order LV., and I find that the case of *Creen* v. *Wright* (1) is an authority on this very point. The facts of the case now before us are more favourable to the plaintiff than were the facts in that case, as there the plaintiff was nonsuited on the first trial, whereas here he obtained a verdict on both occasions, so that he was in the right throughout.

I entirely agree with the decision in *Creen* v. *Wright* (1), and I think that the plaintiff is fully entitled, both on principle and on authority, to all his costs of both trials.

MELLOR, J. I am of the same opinion. Both Order LV. and the case of *Creen* v. *Wright* (1) are clear and conclusive. All the complications which formerly existed are cleared away, and one plain rule now governs all these cases. The costs are to follow the event, and the event is the result of the entire litigation. In this case the first trial was not like an interlocutory application,

(1) 2 C. P. D. 354.

nor was it an abortive issue; it was one of the stages in the whole proceeding, which ended in the judgment in favour of the plaintiff. The plaintiff is therefore entitled to the natural consequences of his judgment, and they include the costs of the whole case. All the proceedings here were but stages of one litigation, which has finally ended in a verdict in favour of the plaintiff.

Order absolute to review taxation.

Solicitors for plaintiff: *Chester & Co.*

Solicitors for defendants: *Nelson, Barr, & Nelson.*

[IN THE COURT OF APPEAL.]

May 18.

BEYNON & CO. *v.* GODDEN & SON.
H. R. EVANS, THIRD PARTY.

Ship and Shipping—Charterparty—Freight—Ship's Husband.

The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer and not in the nature of a charge on the freight; and therefore if he is removed from his office by the owners before he is in a position to receive the freight, an assignee of his interest in the freight cannot maintain a claim to it as against the owners.

When an entire ship is in mortgage, in order to defeat the right of the mortgagor to receive the freight, the mortgagee must take possession of her before the completion of her voyage; but where the mortgagor of certain shares is ship's husband, if the mortgagees join with the owners of the other shares in the ship in the appointment of a new ship's husband before the completion of the voyage, the mortgagor loses all right as ship's husband to receive the freight.

In August, 1876, R. was mortgagor of certain shares in a vessel, and also was acting as ship's husband, and the defendants were charterers of the vessel for the voyage upon which she was then employed. R. obtained from the plaintiffs a loan of 200*l.*, and by a letter dated the 30th of August requested the defendants to pay to the plaintiffs the freight due on the charter. On the 20th of September the mortgagees of R.'s shares and the owners of the other shares appointed E. ship's husband in place of R. Upon the 11th of October the vessel completed her voyage, and upon the 14th began to discharge her cargo; upon the 16th the defendants sent to the plaintiffs a cheque for 200*l.*, which they afterwards dishonoured, E. having claimed the amount of the freight:—

Held, affirming the judgment of Huddleston, B., that the plaintiffs could not maintain an action to recover the amount of the cheque.

ACTION to recover the amount of a cheque.

The facts, course of the trial, and the arguments are sufficiently stated in the judgment of the Court.

Sc. on appt. 4 Ex. D. 246

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March 1, 4, 5. *J. J. Powell, Q.C.*, and *Watkin Williams, Q.C.*, for the plaintiffs, cited, as to the title of the holder of a negotiable security assigned to him for a pre-existing debt: *Misa* v. *Currie.* (1)

Pollard and *Bosanquet*, for the defendants, cited, as to the right of a ship's husband (2) to assign the freight, *Guion* v. *Trask* (3); as to the title of the assignee of freight claiming through a part-owner against the co-owners: *Lindsay* v. *Gibbs* (4); as to the priority of a maritime lien over the claim of a mortgagee: *The Mary Ann* (5); *The Feronia* (6); as to the rights of a mortgagee of a ship upon taking possession: *Brown* v. *Tanner* (7); *Rusden* v. *Pope* (8); *Wilson* v. *Wilson.* (9)

H. Matthews, Q.C., and *A. T. Lawrence*, for *H. R. Evans.*

Watkin Williams, Q.C., replied.

Cur. adv. vult.

May 18. The judgment of the Court (Bramwell, Brett, and Cotton, L.JJ.) was read by

BRAMWELL, L.J. This is an action to recover the amount of a cheque given by the defendants Godden to the plaintiffs. The judgment has been for the defendants, and against this the plaintiffs have appealed. The following are the transactions which gave rise to the plaintiffs' claim.

In August, 1876, T. R. Rees was part-owner of a vessel, the *Eliza*, and he was also acting as the ship's husband. In August he was in want of money, but even assuming, as alleged by the plaintiffs, that he required it for the purposes of ships of which the ownership was the same as that of the *Eliza*, he did not require it for the purpose of earning the freight to be earned by the voyage on which the *Eliza* was then engaged. He applied to the plaintiffs for a loan, and it appears on the evidence of the plaintiff Thomas Beynon, that before he made any advance Rees

(1) 1 App. Cas. 554.

(2) As to the office and authority of a ship's husband see Abbott on Merchant Ships and Seamen, part i. ch. iii. sec. 4, p. 79 (11th ed.), and MacLachlan on Merchant Shipping, ch. iv. p. 173 (2nd ed.)

(3) 1 D. G. F. & J. 373; 29 L. J. (Ch.) 337.

(4) 22 Beav. 522.

(5) Law Rep. 1 A. & E. 8.

(6) Law Rep. 2 A. & E. 65.

(7) Law Rep. 3 Ch. 597.

(8) Law Rep. 3 Ex. 269.

(9) Law Rep. 14 Eq. 32.

stated to him that the ship was in debt to him, Rees, to the extent of 280*l.* The defendants had chartered the ship for the voyage in which she was at the time employed; and on the 30th of August, 1876, the plaintiffs advanced to Rees 200*l.*, and he thereupon signed and gave to the plaintiffs a letter addressed to the defendants, which was dated the 30th of August, 1876, and was as follows:

"Newport, Mon., August 30, 1876.

"Messrs. Wm. Godden & Sons, London,

"Gentlemen,—I hereby give authority, and request that you will pay to Messrs. T. Beynon & Co., of Newport, Mon., the freight on charter of my vessel the *Eliza* dated August 2nd, 1876, bound from Little Curaçoa (W. I.) to U. K. or Continent, in consideration of value received from them."

On the 6th of September this letter was communicated to the defendants Godden, and this letter constitutes a good equitable assignment to the plaintiffs of the freight payable by the defendants, if and so far as Rees was able to assign this freight. The *Eliza* on the 11th of October arrived at Harburgh and completed the voyage for which she was chartered by the defendants, and on the 14th began to unload her cargo. At the time when Rees gave the equitable assignment of the 30th of August, his share of the *Eliza* was in mortgage, and on the 20th of September the mortgagees of his share, and the owners of the other shares, appointed Henry Russell Evans ship's husband in the place of Rees. There was some question whether this appointment was proved at the trial of the action, but on the whole we think that if not proved it was assumed to be the fact that Russell Evans had been so appointed. The *Eliza* began to discharge her cargo on the 14th of October, and on the 16th of that month the defendants, who had previously had some communication with Moyle, their agent at Harburgh, where the vessel was unloading, on the subject of making a payment to the plaintiffs, gave to them a cheque for 200*l.* On the same 16th of October Evans sent a telegram to Harburgh, by which he claimed as registering managing owner of the *Eliza* to be entitled to the freight, and thereupon Moyle telegraphed to the defendants who stopped payment of the cheque given to the plaintiffs, and the action is brought to

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recover the amount with interest. The defendants after the commencement of the action insisted that Russell Evans should be made a party to the action, on the ground that they, if liable to the plaintiffs, were entitled to relief over as against him.

The action was tried at Gloucester before Baron Huddleston without a jury. He decided in favour of the defendants, but he ordered them to pay the costs of Evans, and also gave the plaintiffs against the defendants any costs which they had incurred in consequence of Evans having been summoned as a third party. The plaintiffs have appealed and asked that judgment may be given for them, or that a new trial may be directed, and the defendants have also appealed against the direction that they should pay the costs incurred by summoning Evans as a third party.

The right of the plaintiffs must depend on the question, whether at the time when the cheque was given, they were entitled to receive the freight of the *Eliza* either absolutely or to the extent of 200*l.*

Under the charterparty one-third of the freight was payable on arrival at the port of discharge, and it was argued on behalf of the plaintiffs, that Messrs. Matthiessen & Co., of Harburg, had by their directions and on their account paid sums of money exceeding 200*l.* for the expenses of the ship there, and that consequently the plaintiffs were entitled to the extent of these payments to receive the portion of the freight payable at Harburg. But it appears that these payments were made on account of the defendants as charterers, and were repaid by them to Messrs. Matthiessen.

Had, then, Rees power to assign the freight of the *Eliza?* At the time of obtaining the advance from the plaintiffs he was ship's husband; but as such, in our opinion, he had no power as against his co-owners to assign or pledge the entire freight. Apparently the plaintiffs made the advance to him on his representation that the money was owing to him as ship's husband by his co-owners; and if this was the fact, and he as ship's husband had received the freight, the co-owners must have allowed him in account the sums due to him before they could have claimed their shares of the freight, and he could have assigned to the plaintiffs this his interest therein. But this interest is a right of lien or retainer,

and not in the nature of a charge on the freight, and as he was removed from being ship's husband by the act of the mortgagees and of the co-owners before he was in a position to receive any part of the freight, the plaintiffs cannot, even if there were a balance due to Rees, claim by virtue of his assignment to receive the freight.

An attempt was made to shew that the co-owners of the *Eliza* had given Rees at least implied authority to borrow money on security of the freight; but in our opinion the evidence does not support this contention.

The result, in our opinion, is that Rees had no power to assign the entire freight. But the question still remains whether Rees could assign his own share of the net freight, that is, of the freight remaining after paying all expenses connected with the voyage. At the trial there was no evidence that there was such a balance; but we might receive evidence now or direct an inquiry for the purpose of ascertaining whether there was any such balance of freight; but in our opinion the plaintiffs cannot under the circumstances sustain any claim even to Rees' share of the net freight. For Rees' share was in mortgage, and in our opinion the mortgagees effectually interfered, so as to entitle themselves to Rees' share of the freight, as against him and the plaintiffs as his assignees. If the entire ship had been in mortgage, to defeat the right of the mortgagor to receive the freight, it would have been necessary to establish that the mortgagee had taken possession of the ship before she completed her voyage. But the mortgage was of certain shares only in the ship, so that the mortgagees were not in a position to take possession of the ship, and in our opinion the mortgagees, by joining with the owners of the other shares in the ship in the appointment of a ship's husband in the place of Rees, which they did before the ship reached Harburgh, effectually intervened so as to entitle themselves to the freight to be earned, and to displace the title thereto of Rees and of his assigns. The plaintiffs' appeal entirely fails, and must be dismissed with costs.

There remains the appeal of the defendants. In our opinion this appeal fails. As far as appears, Russell Evans did not receive the freight or any part of it. All that he did, was as agent of other parties to give the defendants directions not to pay the

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freight to the plaintiffs. It was for them to decide whether they would act on these directions or not, and there was no sufficient reason for summoning Russell Evans as a third party.

Judgment affirmed.

Solicitors for plaintiffs: *Thomas White & Sons, for J. D. Pain & Son, Newport, Monmouthshire.*

Solicitors for defendants: *Cowdell, Grundy, & Browne.*

Solicitors for H. R. Evans: *Stocken & Jupp.*

June 18.

HARRIS AND ANOTHER *v.* MOBBS.

Nuisance—Van left on Roadside—Obstruction of Highway—Fright of Horses—Development of Vice thereby—Kicking Horse—Damage to Driver—Proximate cause of.

12 QBD 111
112-3.

A house-van attached to a steam-plough was left for the night on the grassy side of a highway by the defendant. The van and plough were four or five feet from the metalled part of the way. During the evening the plaintiffs' testator drove his mare in a cart along the metalled road. The mare was a kicker, but he was unaware of her vice. Passing the van she shied at it, kicked, and galloped kicking for 140 yards, then got her leg over the shaft, fell, and kicked her driver as he rolled out of the cart. He afterwards died from the kick so received.

In an action under Lord Campbell's Act (9 & 10 Vict. c. 93, s. 1), by his executors for wrongful and negligent obstruction of the highway, the jury found that the van was left where it stood unreasonably, and negligently, and caused some appreciable danger to vehicles passing along the metalled parts of the road; that the death was occasioned by the van standing where it did, and by the inherent vice of the mare combined, and that there was no contributory negligence:—

Held, that on these findings the verdict and judgment must be for the plaintiffs; for the unauthorized, unreasonable, and dangerous user of the highway by the defendant was the proximate cause of the injury.

IN this action, tried at Oxford spring assizes, 1878, before Denman, J., and a special jury,

J. J. Powell, Q.C., and *A. T. Lawrence*, moved to enter judgment for the plaintiffs.

H. Matthews, Q.C., and *Bosanquet*, shewed cause.

Cur. adv. vult.

Sc Thotts Shortland 48 20 Ch 22 Mob

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The pleadings, facts, findings, and arguments are stated in the following judgment:—

June 18. DENMAN, J. This was an action brought by the plaintiffs as executors of one James Harris, under Lord Campbell's Act. The defendant was the owner of a steam-plough, which travelled about the country drawn by a steam-engine, and which also had attached to it a house-van. The cause of action alleged in the statement of claim was that the defendant so wrongfully and negligently obstructed the highway by placing and leaving thereon a large house-van, with ploughing gear attached, that the deceased was hindered and prevented in his user of the highway, and his mare was frightened and rendered unmanageable, and his cart damaged, and he received serious injuries in the knee, of which he died. The defendant denied that he obstructed the highway, and that the injuries happened through any obstruction, or in consequence of the van being drawn up at the side of the highway, but alleged that the horse became unmanageable at a considerable distance from the house-van, and after the deceased had driven safely by the said van, and that the mare, which was vicious, kicked and upset the cart in which the deceased was driving. At the trial it appeared that the house-van in question was placed on some grass at the side of the metalled part of the line of road. It had been placed there early in the afternoon, and was still there when the accident happened between 7 and 8 P.M., on the 27th of September, being engaged to work in an adjoining field on the following morning. The engine had been taken elsewhere, but the plough remained attached. The persons in charge of the van and plough had made no attempt to take them into the field, which they explained by stating that the ground was in a slippery state, not favourable for such an operation, and that from their experience they knew that it would have been impossible to get it in on that night. This view, however, did not satisfy the jury, as appears from the answers to the questions put. Several witnesses were called who proved that on the same afternoon they had driven along the same road, and that their horses had shied and swerved considerably at the house-van, standing in the same spot, but no accident had happened in consequence. There was a strong body of evidence for the defendant, to shew

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that the mare was a confirmed kicker, and some evidence to the effect that the deceased must have known of the habit. The finding of the jury, however, must I think be taken to absolve the deceased from any knowledge that the mare was a dangerous one to drive. The evidence for the defendant was also directed to an attempt to prove that the deceased was guilty of negligence in his treatment of the mare at the time she shied; but the finding of the jury disposes of this point. The house-van stood between four and five feet from the metalled part of the road. There was very little difference between the accounts given by the witnesses on both sides of the occurrence itself. The mare appears to have shied immediately opposite to the van, away from the van, towards the off-side of the road, and to have swerved continually to the right until she got the off-wheel on the footpath, and to have begun kicking while galloping on so violently as to kick the dash-board to pieces, and finally to have got her leg over the shaft, when she fell, and the deceased rolled out of the cart, which was not itself upset, and he was kicked in the knee by the mare so badly that about seven weeks afterwards he died from erysipelas occasioned by the injury. The witnesses all agreed that the distance of the place where she fell from the van was about 140 yards.

Such being the evidence so far as it was adopted by the jury, it was contended by Mr. Matthews for the defendant that the action would not lie on the following grounds:—

First, that,—though he admitted that the grass upon which the van and plough stood was a part of the highway, and though it standing there might constitute an obstruction so that if a horseman, or even the driver of a vehicle, wishing to use that part of the highway had been obstructed and injured, an action might lie,—still in the present case no action would lie because there had been no obstruction, in fact, of the deceased, and no more danger caused by the van or plough than would have been occasioned by the same objects passing along the highway drawn by horse-power as they lawfully might have been. It was also contended that the accident had happened wholly or in part by reason of inherent vice in the mare herself, and that it was not the necessary or natural result of being frightened that the mare should kick violently and destroy the vehicle it was drawing. The jury in

answer to questions put by me found, that the van was left standing where it stood (1) unreasonably, and (2) negligently "considering that no effort had been made to place it in the field." In answer to question (3), "Was it dangerous to vehicles passing along the metalled part of the road?" They found "not more so than if the same van had been in motion travelling along the road with horse-power." I requested them if possible to answer the question "aye" or "no," and after a second retirement to consider that question, they answered, "There was some appreciable danger in leaving it standing there. That is the only unanimous answer we can give." The 4th question put to the jury was as follows: "Was the death of the deceased occasioned by the van standing where it did? Or was it a mere accident? Or was it due to negligence of the deceased in his management of the mare? Or to inherent vice of the mare? Or to any two or more of these causes, or to all combined?" The jury answered, "To all combined, except negligence of the deceased and mere accident;" and, in answer to a further question, they said that they meant to find that it was due to the van being where it was, and to the inherent vice of the mare combined. Fifthly. They found that there was no contributory negligence in the deceased; and they assessed the damages at 250*l.*, one-third for the widow, and two-thirds for the children. I reserved the case for further consideration, and it was argued before me during the last sittings. The first point insisted upon was that no action would lie for an obstruction of the highway, where the person alleged to be obstructed had been using a different part of the highway, viz., the metalled part of the road, and that there was no instance to be found in the books of an action for damage caused by an obstruction to a highway, where the obstruction consisted merely of some occupation of the ground likely to cause terror to horses passing along the highway.

It is true that there is an absence of express authority upon this point; but I think that it follows from cases which have been decided, that if there be an act done upon any part of the highway which is not a part of the reasonable user of it, and which has the effect of endangering its use to others, and damage results from such act in the course of a lawful user of the highway, an

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action will lie for such damage. It has been held that the occupation of one side of a public street for several hours at a time, so as to prevent any carriage from passing on that side of the street, although room was left for two carriages to pass on the opposite side, is an indictable nuisance: *Rex* v. *Russell* (1); from which case, and from the case of *Reg.* v. *Cross* (2), it appears that the real question in such cases is whether the highway has been obstructed for an unreasonable time and in an unreasonable manner, or, in other words, in such a way as to amount to something beyond a fair and reasonable use of the way. The jury in the present case have found that the van in question was unreasonably left where it was at the time of the accident, by which I understand that it was not a fair and reasonable use of that part of the highway with reference to the rights of others. They have also found that it was appreciably dangerous, by which I understand that it was in their opinion likely to cause horses to shy or take fright in passing along the metalled part of the road. This finding was qualified by the addition "but not more so than if the same van had been in motion travelling along the road with horse-power." On consideration, I do not think this supposed qualification material. In the first place it leaves open the question whether, even if the van in question had been travelling along the high road drawn by horses with the plough attached, it might not, in the opinion of the jury, have been deemed to be a nuisance. I am not at all sure, indeed, that in that case, upon the same findings, it would not have been the duty of a judge to enter the verdict for the plaintiffs: see *Watkins* v. *Reddin*, per Erle, C.J. (3); but, at all events, I think it clear that the question whether it would or would not have been a nuisance in that case is a totally different question from that which arises in the present case, for it might be quite reasonable to convey such machines along the road from point to point, and yet wholly unreasonable to increase the danger caused by them by leaving them all day and night on the high road, or closely adjoining to it. I cannot agree with the view submitted by the defendant's counsel that there must be an injury caused by an actual physical obstruction

(1) 6 East, 427. (2) 3 Camp. 224.
(3) 2 F. & F. 629, at p. 634.

before an action will lie. Suppose a man were to occupy the grassy side of a highway with three or four cannon, and to keep firing them from morning to night, so as to terrify the horses passing along the metalled part of the road, I cannot doubt that he would be liable for the consequences, and that he would have wrongfully hindered and prevented in the user of the highway any one whose horse might have been frightened by such conduct. I do not think that it could, in such a case, be said that the right of passage had not been obstructed, or at least hindered and prevented, merely because the horse in question had not come into actual collision with the cannons, or merely because the cannons were not on that part of the highway along which the horse was travelling. It appears to me to follow, from the above considerations, that the plaintiff is entitled to the verdict and to judgment, so far as the above point is concerned, on the ground that the jury have, in effect, found that there was an unreasonable and dangerous occupation of a part of the highway amounting to an obstruction and prevention of its free user by the public to an extent which was unreasonable. The jury also found that there was negligence in placing and leaving the van and plough where they were, on the ground that there was no attempt to place it in the field. I am not quite sure whether the jury intended to find negligence with reference to the probable danger of leaving the van where it was, owing to the fact that they were unwilling to return any verdict expressly in favour of plaintiff or defendant, and they afterwards qualified their finding as to danger by the word "appreciable," as I surmise, from an inability to agree upon the question of negligence with reference to anything except making no attempt to get the van and plough into the field. I should, therefore, not feel myself justified in entering the verdict for the plaintiff upon the finding of negligence alone; and I abstain from further dealing with that part of the case.

I now come to that part of the case which has appeared to me to be the most difficult. It was, I think, clearly made out at the trial that the mare which the deceased was driving was a vicious mare, in the sense that she was a kicker. It must, however, be taken that the jury negatived any knowledge in the deceased of this habit, such as would have rendered it negligent in him to

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drive the mare. Contributory negligence on any other ground was negatived. The immediate cause of the accident was clearly that the mare in kicking got her leg over the shaft which caused her to fall, and in falling, the deceased received the kick which ultimately caused his death. The jury found that the accident was due to the van being there (which must be taken to mean "to the van being unreasonably left on that part of the highway so as to cause some danger to vehicles passing by"), combined with the vice of the mare. I understood this finding to mean that the accident would not have happened but for both these causes combined—an unreasonable and dangerous user by the defendants of that part of the road by their van and plough so as to cause danger to vehicles passing by—and an exceptionally dangerous animal shying, and running away from fright at the van and ploughs and then kicking the vehicle whether from fright or vice, the kicking being an exceptional vice in the mare. This finding must also, if possible, be reconciled with the other finding that the accident was not a mere accident, which was explained to the jury as meaning one for which no one was to be fairly considered to blame.

The plaintiffs' counsel argued that inasmuch as the defendant was guilty of an unauthorized and dangerous act in derogation of the public rights by which the mare had been frightened, this must be taken to be the only material cause of the mischief, the deceased being guilty of no wrong at all, and the whole transaction being one flowing directly from the alarm caused by the defendant's unauthorized act.

On the other hand, it was contended that the causa proxima of the injury was the kicking of the mare, which was not a necessary or natural consequence either of the shying or of the running away, so that although it might be true that in some sense the van and plough being there, led to the accident, it was not true that their being there was material to the accident, or caused it, in such a sense so to make the defendant responsible for it.

Though not without considerable hesitation, I have come to the conclusion that the plaintiffs are entitled to have the verdict and judgment entered for them. Looking at the undisputed facts in the case, I think it is clear that though the immediate cause of

the accident was the kicking of the mare, still the unauthorized and dangerous appearance of the van and plough on the side of the highway was within the meaning of the law the proximate cause of the accident. It cannot I think be laid down that no one is entitled to recover damages for an injury caused by a kicking horse in the absence of any knowledge on his part that it is such. In the present case it must be taken that the deceased was not aware that the horse was a kicker. Then was the kicking which caused the death a natural and necessary consequence of the act complained of? I think upon the whole that it was. The van was there, and it in fact frightened the deceased's mare so that she shied and swerved to run away, and having got one wheel on the footpath kicked violently, and within 150 yards fell and injured the deceased so that he died. The whole transaction is within a few seconds, and originates in the fright of the mare caused by the van. I think it cannot be laid down as having been the duty of the deceased to abstain from driving the mare. On the other hand, it cannot be laid down as the right of the defendant to assume that no nervous or runaway or kicking horse would come along the highway. It is only in the case of horses liable to be frightened that any danger exists, and where a horse has once been frightened by a dangerous apparition unlawfully placed on the highway, running away and kicking can hardly be considered to be unusual or unnatural consequences of the fright. The wrongdoer has no right to lay down the measure of his own wrong, or to limit the free use of the highway to horses which shall only shy when frightened and do no further mischief. On the whole, I think that the finding of the jury only amounts to this, that the accident was caused by the van, but that if the horse had not been a kicker it would not have happened. Looking at the finding and the facts together, I come to the conclusion that the plaintiffs were entitled to the verdict. I therefore direct it to be entered for them for the amount assessed by the jury, and give judgment for that amount with costs.

Verdict and judgment for the plaintiffs.

Solicitor for plaintiffs: *Walliner.*

Solicitors for defendant: *Field, Roscoe, & Co.*

1878
Feb. 28.

[IN THE COURT OF APPEAL.]

THE ATTORNEY GENERAL *v.* MOORE.

Statutes—Interpretation—Penalties—Municipal Corporations Act (5 & 6 *Wm.* 4, *c.* 76), *s.* 126—3 & 4 *Vict. c.* 97, *s.* 16—*Leges posteriores priores contrarias abrogant.*

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Sect. 126 of the Municipal Corporations Act provided that when by any Act any penalties or forfeitures should thereafter be made recoverable in a summary way before any justices of the peace and by such Act the same should be made payable to His Majesty, in every such case the same, if recovered and adjudged before any justice of any borough in which a separate court of quarter sessions of the peace should be holden, should be adjudged to be paid to the treasurer of the borough to the credit of the borough fund.

A subsequent Act, 3 & 4 Vict. c. 97, enacted, by s. 16, that certain offenders might be taken before a justice of the peace and convicted summarily, and should thereupon forfeit to Her Majesty a sum not exceeding 5*l*..

An offender having been convicted under the last-mentioned Act, before justices in a borough having a separate court of quarter sessions, was sentenced to pay a fine:—

Held, affirming the judgment of the Exchequer Division, that the provisions of the Municipal Corporations Act must be read as incorporated in the subsequent Act, and that the fine was therefore payable to the borough treasurer.

THIS was a special case stated by consent in a proceeding upon the revenue side of this division, instituted by the Attorney General against the defendant as clerk to the justices of the borough of Warwick, to recover a sum of 1*l.* 10*s.*, being fines received by the defendant as such clerk, and alleged to be payable to Her Majesty.

1. The borough of Warwick is one of the boroughs mentioned in schedule A of 5 & 6 Wm. 4, c. 76, as having a commission of the peace. It has also a separate court of quarter sessions. The defendant is clerk to the justices of the peace of the borough.

3. In May, 1876, Amos Dalton was convicted, before two of the justices of the peace of the borough, of a breach of 3 & 4 Vict. c. 97, s. 16, for that he did unlawfully and wilfully obstruct and impede one Robert Billington, then being in the execution of his duty on the Great Western Railway, and was adjudged for this offence to forfeit and pay the sum of 5*s.*, to be paid and applied according to law.

4. In September, 1876, John Reeves was convicted before two of the justices of the peace of the said borough of a similar breach of the same statute, and adjudged to forfeit and pay the sum of 1*l.* 5*s.*, to be paid and applied according to law.

5. The fines were received by the defendant.

6. Subsequently the Lords Commissioners of Her Majesty's Treasury claimed that the fines were payable to the Consolidated Fund, and ought to be paid over by the defendant to the receiver of fines.

7. The defendant has declined so to pay over the fines, or either of them.

8. It is contended on behalf of Her Majesty that upon the right construction of the statute 3 & 4 Vict. c. 97, s. 16 (1), the fines ought to be paid to Her Majesty. The defendant contends that upon the right construction of 5 & 6 Wm. 4, c. 76, s. 126 (2),

(1) 5 & 6 Wm. 4, c. 76, s. 126, enacts that "when by any Act any penalties or forfeitures are or shall hereafter be made recoverable in a summary manner before any justice or justices of the peace, and by such Act respectively the same are or shall be limited and made payable to His Majesty, or to any body corporate, or to any person whomsoever, save and except the informer, who shall sue for the same, or any party aggrieved, in every such case the same, if recovered and adjudged before any justice of any borough in which a separate court of quarter sessions of the peace shall be holden as aforesaid, shall, notwithstanding anything in such Act respectively contained, be recovered for and adjudged to be paid to the treasurer of such borough for the time being, to the credit and on account of the borough fund of such borough; and no such penalty or forfeiture, or share of such penalty or forfeiture, shall in any case be recovered by or adjudged to be paid to any other person than the said treasurer, unless such person be the informer or the party aggrieved: Provided always, that nothing herein contained shall extend to any penalties or forfeitures recovered under any Act relating to the customs, excise, and post office, or to trade or navigation, or any branch of His Majesty's revenue."

(2) 3 & 4 Vict. c. 97, s. 16, enacts that "if any person shall wilfully obstruct or impede any officer or agent of any railway company in the execution of his duty upon any railway, or upon or in any of the stations or other works or premises connected therewith, or if any person shall wilfully trespass upon any railway, or any of the stations or other works or premises connected therewith, and shall refuse to quit the same upon request to him made by any officer or agent of the said company, every such person so offending, and all others aiding or assisting therein, shall and may be seized and detained by any such officer or agent, or any person whom he may call to his assistance, until such offender or offenders can be conveniently taken before some justice of the peace for the county or place wherein such offence shall be committed, and when convicted before such justice

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the fines ought to be paid to the treasurer of the borough to the credit and on account of the borough fund, inasmuch as the Act under which the penalties were recovered is not an Act relating to trade, so as to bring it within the provisions of the last mentioned section. (1)

The question for the opinion of the Court is whether the fines ought to be paid to Her Majesty or not.

1877. Dec. 6. *Sir Hardinge S. Giffard, S.G.* (*C. Bowen*, with him), for the Attorney General. The two Acts are inconsistent if they are read together, and what is prior in point of time cannot be read as governing the second. The express words of the later Act must, by the ordinary rules of construction, be taken to have been used with reference to the language of the prior one, and pro tanto to repeal it. [He referred to *Wray* v. *Ellis* (2)].

J. W. Mellor, Q.C. (*Dugdale*, with him), for the defendant, was not heard.

KELLY, C.B. I will first, in giving judgment, refer to the earlier Act to see if there is any ambiguity in it, or whether anything is left to be implied, and then I will consider the effect of it on future legislation. It commences, "when by any Act any penalties or forfeitures are or shall hereafter be made recoverable in a summary manner before any justice or justices of the peace." That applies to future as well as to existing Acts, and therefore includes the case of penalties or forfeitures thereafter made recoverable in a summary manner before any justice or justices of the peace, which is the case here. So far the words are applicable, but it continues:

as aforesaid (who is hereby authorized and required, upon complaint to him upon oath, to take cognizance thereof, and to act summarily in the premises) shall in the discretion of such justice, forfeit to Her Majesty any sum not exceeding five pounds, and in default of payment thereof shall or may be imprisoned for any term not exceeding two calendar months, such imprisonment to be determined on payment of the amount of the penalty."

(1) The question whether 3 & 4 Vict. c. 97, s. 16, is an Act relating to trade within the meaning of 5 & 6 Wm. 4, c. 76, s. 126, was not referred to in the argument in the Exchequer Division, and during the argument in the Court of Appeal Sir Hardinge S. Giffard stated that he did not ask for a decision upon this question.

(2) 1 E. & E. 276; 28 L. J. (M.C.) 45.

"and by such Act respectively the same are or shall be limited and made payable to His Majesty or to any body corporate, or to any person whomsoever, save and except the informer, who shall sue for the same or any party aggrieved, in every such case the same, if recovered and adjudged before any justice of any borough in which a separate court of quarter sessions of the peace shall be holden as aforesaid, shall, notwithstanding anything in such Act respectively contained, be recovered for and adjudged to be paid to the treasurer of such borough for the time being to the credit and on account of the borough fund of such borough; and no such penalty or forfeiture or share of such penalty or forfeiture shall in any case be recovered by or adjudged to be paid to any other person than the said treasurer, unless such person be the informer or the party aggrieved." So far no inconsistency appears. We then find in the subsequent Act of Parliament, 3 & 4 Vict. c. 97, s. 16, that if any person shall commit a certain offence upon a railway, such person shall or may be seized and taken before one of the justices of the peace "for the county or place wherein such offence shall be committed, and when convicted before such justice as aforesaid shall, in the discretion of such justice, forfeit to Her Majesty any sum not exceeding five pounds." There is thus an Act saying that if this penalty be recoverable and recovered it shall be payable to the Queen; but then we look back to the former Act and see that notwithstanding the Act makes such a penalty payable to the Queen, yet since the complaint is made before the justices of a borough for which a separate court of quarter sessions is holden, the penalty shall not be paid to the Queen but to the treasurer of the borough. I see nothing inconsistent in the two Acts of Parliament. They must be read together, and the earlier Act, the Municipal Corporations Act, introduces into this clause 16 an exception, as to the application of the penalty, to the general terms of the provision that the penalties are to be paid to Her Majesty, and under these circumstances I think the Crown is not entitled to succeed.

CLEASBY, B. I cannot myself entertain any doubt in this case. There is no repeal of the Municipal Corporations Act, s. 126. It

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is in substance this, that all penalties hereafter payable to His Majesty shall go to the borough fund under certain circumstances which are specified. This is the language of the legislature, which deals expressly with penalties to be afterwards made payable to His Majesty. Then a subsequent Act was passed by the same legislature, and it declares, after imposing penalties, that they shall be payable to Her Majesty. The language of the 16th section of 3 & 4 Vict. is "forfeited to Her Majesty." It cannot be said that that is not, within the language of the Municipal Corporations Act, payable to Her Majesty. I can see no inconsistency whatever between the two statutes; the one carries out the object of the other and increases the penalties, which are to go to the borough fund.

POLLOCK, B., concurred.

Judgment for the defendant.

The Attorney General appealed.

1878. Feb. 28. *Sir Hardinge S. Giffard, S.G.*, for the Attorney General.

Kenelm Digby and *G. G. Kennedy* (*John W. Mellor, Q.C.*, with them), for the defendant.

BRAMWELL, L.J. I feel no doubt as to this case. The Municipal Corporations Act, s. 126 contemplates that by future legislation penalties will be imposed payable to the Crown, and that this subsequent legislation will not discriminate between boroughs having quarter sessions upon the one hand and boroughs not having quarter sessions and counties upon the other; it therefore provides that wherever by a future statute a penalty is rendered recoverable before justices of the peace it shall, as a general rule, be paid over to the borough fund, if the conviction takes place in a borough having a separate court of quarter sessions. It is a very plain case for the defendant.

BRETT, L.J. In my opinion 5 & 6 Wm. 4, c. 76, s. 126 is not repealed by 3 & 4 Vict. c. 97, s. 16. The earlier statute contem-

plates that by subsequent Acts penalties will become payable to the Crown, and it provides that in certain cases they shall go to the borough fund. The 3 & 4 Vict. c. 97, s. 16 does not repeal in express terms 5 & 6 Wm. 4, c. 76, s. 126; and I apprehend that it does not repeal it by implication, because the two may be read together, and some application may be made of the words in the later Act consistently with the existence of the words in the earlier Act. The words of 3 & 4 Vict. c. 97, s. 16 apply in their ordinary sense to every instance, except to the case of boroughs having separate courts of quarter sessions. The penalty is forfeited to the Crown, but pursuant to the earlier statute it must be paid over to the borough fund.

COTTON, L.J. I am of the same opinion. The object of the Municipal Corporations Act, s. 126 was to grant to the borough fund certain penalties forfeited to the Crown, and this consideration alone will make the two statutes consistent; but it is to be further observed that the later Act will apply in direct terms to all cases except those where boroughs have separate courts of quarter sessions.

Judgment affirmed.

Solicitors for Attorney General: *Hare & Fell, for the Solicitor of the Treasury.*

Solicitors for defendant: *Hare & Fell, for G. Moore, Warwick.*

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May 2.

[IN THE COURT OF APPEAL.]

ACATOS *v.* BURNS AND ANOTHER.

Ship and Shipping—Authority of the Master to sell Goods damaged on the Voyage—Freight pro ratâ itineris—Warranty by Shipper that Goods were fit to be shipped.

A master of a vessel cannot at an intermediate port sell goods, which are damaged and cannot be carried to the port of discharge, without communicating with their owner.

Where goods damaged on the voyage are landed at an intermediate port and sold without the assent of their owner, the shipowners are not entitled to freight pro ratâ itineris.

Where the owner of a vessel has an opportunity of examining goods shipped on board of her, no warranty on the part of the owner of the goods can be implied that they are fit to be carried on the voyage.

CLAIM stated that on the 1st of March, 1876, the plaintiff by his agent, one Zalachi, at Constantinople, caused to be shipped on board the defendants' steamship *Sidon*, 439 quarters of Indian corn or maize of the plaintiff in good order and condition to be carried from Constantinople to Liverpool, and thence to be delivered in like good order and condition to the plaintiff, certain perils only excepted, according to the terms of a certain bill of lading then signed for the same by the agents of the ship: that the defendants did not carry to and deliver at Liverpool the goods, although not prevented by any of the excepted perils from so doing, but the defendants, without the consent of the plaintiff, transferred the maize from the ship while lying at the port of Smyrna into lighters, and afterwards, and without the consent of the plaintiff, sold the same at a price much below its real value, and converted the maize to their own use, and wrongfully deprived the plaintiff of it.

Defence and counter-claim.

The defendants admitted the non-delivery of the maize, and denied it was shipped in good condition, and alleged that the port of Smyrna was a port where by the terms of the bill of lading the defendants' steamship, the *Sidon*, had liberty to call. On her arrival there the parcel of maize was found to be in such a con-

dition, owing to its inherent vice, or to the operation of causes within the true intent and meaning of the exceptions and other provisoes of the bill of lading, as to render the further transport of the same impossible, and the presence of the same on board the steamship dangerous to the steamship and her cargo. In consequence of its condition the parcel of maize was unloaded and sold at Smyrna. That the sum due from the defendants to the plaintiff in respect of the proceeds was 77*l.* and the defendants admitted their liability to the plaintiff in respect of that sum subject to the defendants' counter-claim. They also denied the conversion.

By way of counter-claim the defendants claimed that the condition of the parcel of maize at the time of its shipment at Constantinople was such as to render its shipment on board the defendants' steamship the *Sidon* dangerous to the steamship and her other cargo; that the dangerous condition of the maize was not apparent, and that the defendants did not and could not be expected to know the same; that the plaintiff had knowledge of the dangerous condition of the maize at the time of its shipment, and wrongfully shipped the same on board the defendants' steamship without giving the defendants notice thereof. On the arrival of the steamship at Smyrna the dangerous condition of the maize was discovered, and the same unloaded and sold, and that the steamship was in consequence detained at Smyrna and her detention had occasioned a loss to the defendants.

That it was agreed between the plaintiff and the defendants that the plaintiff should pay the defendants a proportionate amount of freight for the carriage of the goods from Constantinople to Smyrna, but the plaintiff has not paid the same.

Reply denied the allegations in the statement of defence and counter-claim, and alleged as to the demand for freight pro ratâ that the plaintiff always insisted on his right to have the maize carried to Liverpool. Issue thereon.

At the trial at the London Michaelmas Sittings, 1877, before Huddleston, B., the following facts were proved. The maize was shipped at the end of February, 1876, by the plaintiff's agent at Constantinople on the defendants' steamer *Sidon* to be carried to and delivered at Liverpool. It was taken alongside the steamer

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in lighters and shipped in bulk; it was winnowed on board by the plaintiff's agents, and after every fifty kilos were shipped the second officer of the *Sidon* examined it; apparently it was in good order and condition. On the 3rd of March the vessel arrived at Smyrna; the master then found that the maize had become heated, and after a survey held on the 7th of March a portion of it was discharged into a lighter; on a further survey it was found that some of it had sprouted, and that the whole parcel was in bad condition, and could not be kept on board without danger to the rest of the cargo. The remainder of the maize was then discharged into three other lighters, and the four lighters with the 439 quarters of maize were brought into the new docks at Smyrna. On the 16th of March the *Sidon* sailed from Smyrna for Liverpool without the maize. Endeavours were then made to have the maize carried to Liverpool by other steamers, but without success; the masters of several steamers having refused to take it on any terms on account of its bad condition.

On the 10th of March, the defendants' agent at Smyrna, Malcozzi, telegraphed to the defendants' agent at Constantinople, Grace, to inform the shipper of the maize, the plaintiff's agent, that it had heated; that a survey had been held, and that Lloyd's agent recommended its discharge and disposal. On the 12th of March, Grace telegraphed to Malcozzi, "Merchant wishes grain to go to Liverpool." On the 13th of March, Malcozzi again telegraphed to Grace: "Second survey held; grain worse; recommended the immediate discharge and disposal; grain impossible to support voyage to Liverpool." On the same day Grace again telegraphed to Malcozzi: "Merchant wishes grain to be forwarded to Liverpool." On the 27th of March a third survey was held which was most unfavourable, and Lloyd's agent again recommended that the grain should be disposed of for the benefit of the parties. On that day, after the survey, Malcozzi telegraphed to Grace: "have held survey, which reports grain unfit for shipment, and which will be sold to-morrow by public auction for the benefit of whom it may concern." On the 28th of March, Grace telegraphed to Malcozzi: "Shippers protest strongly against sale of grain; want stuff to remain in lighters until they come down personally." On the 28th of March, the maize was sold by public

auction, and realised 77*l.* after deducting expenses. An agent was sent to Smyrna from Constantinople on behalf of the plaintiff, to inspect the maize and act on his behalf in such manner as might be necessary, but on his arrival he found that the maize had been sold.

The jury found, in answer to questions left to them by the learned judge, that the maize was not in good order and condition when shipped at Constantinople, and was in such a state as would be dangerous to the ship and cargo, but not apparently so to the shipper. That its state could not be ascertained by reasonable means, and that all reasonable means had been adopted. That the defendants could have communicated with the owner of the maize before they sold it, and that the sale under the circumstances was not one of such urgent necessity as to give no time or opportunity for communicating with the owner; and that the sale of the maize in the manner the defendants sold it was a prudent measure.

The plaintiff claimed to be entitled to judgment, not only for 77*l.* the proceeds of the sale, but for the actual value of the grain, which was agreed between the parties to be 100*l.*

The learned judge directed judgment to be entered for the plaintiff for 77*l.* on the claim; and also directed judgment to be entered for him on the counter-claim.

The plaintiff appealed against so much of the judgment as decided that he was not entitled to the actual price of the grain. The defendants brought a cross appeal on the judgment on the counter-claim.

May 1. *Watkin Williams, Q.C.*, and *McLeod*, for the plaintiff. The sale of the cargo was unlawful, inasmuch as the captain had an opportunity of communicating with its owner. It is immaterial that the jury have found that it was reasonable and proper to sell, for they have also found that there was no urgent necessity for the sale. It is "urgent necessity" alone which justifies a sale, and the cargo ought to have remained at Smyrna in lighters until the decision of the owners could be known. *Cobequid Marine Insurance Co.* v. *Barteaux* (1) is an authority very much in favour of the plaintiff, for it related to the sale of a ship by her captain; and

(1) Law Rep. 6 P. C. 319.

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the master of a vessel may be considered the agent of her owner, but he can hardly be deemed the agent of the owner of the cargo. The captain may have acted bonâ fide; but the defendants are liable for the sale of the maize, for it might have been carried on and delivered at its port of destination, although in a damaged condition: *Tronson* v. *Dent.* (1) The sale being wrongful, the plaintiff is entitled to the actual value of the maize.

May 2. *C. Russell, Q.C.*, and *Warr*, for the defendants. The extent of the master's authority to sell the cargo depends upon all the circumstances of the case. In this case, the cargo was damaged by its own inherent vice; it was a perishable cargo; great expense would be incurred by keeping it in lighters, and it was daily deteriorating in quality and value; it was therefore for the benefit of all parties that the cargo should be sold. If the master did not sell, the position of the shipowner would be one of risk. The master would have to pledge his owner's credit for the rent of the lighters or the warehouse. Then for how long was he to keep the goods warehoused?

[BRAMWELL, L.J. The jury have found that there was no urgent necessity for the sale; the sale was therefore wrongful.

BRETT, L.J. It has been fully established by authority, that the master cannot hypothecate the cargo or freight if he has the means of communicating with the owner, and that is a question of fact for the jury.]

The argument on the other side is that, although the goods are perishing from an inherent vice, yet if the shipper objects to a sale the master cannot sell the goods. What then is he to do with them? he cannot throw them on the quay and there leave them. The master is bound to act reasonably with regard to the owners of the ship and of the cargo, and he must consider the other freighters. He is only bound to do what a prudent man would do: he is not bound to sacrifice the voyage. *The Gratitudine* (2). The bailment in this case differs from all other bailments; here the bailee through representing the ship is representing the goods as well, and must do what an owner of goods would reasonably under the circumstances do. There is ample authority in the master, when

(1) 8 Moo. P. C. 419, at p. 448. (2) C. Rob. 240.

goods cannot be carried on in specie, to sell them, and to do his best for all parties. *Notara* v. *Henderson.* (1)

Secondly. Assuming that the sale was rightful, the defendants are entitled to freight pro ratâ. *The Soblomsten.* (2)

Thirdly. There was a warranty that the goods were fit to be shipped, and there was a breach of this warranty: *Brass* v. *Maitland* (3). That case is approved of in the American courts in *Pierce* v. *Winsor.* (4) All the cases on the point are collected in Angel on Carriers, s. 212, note *c.*

W. Williams, Q.C., was heard in reply.

BRAMWELL, L.J. I think that the plaintiff's appeal must succeed. I think that, when the jury found that to have sold the maize in the manner the defendants did was a prudent measure, it may seem hard on them that they should have to pay damages, and damages to a greater amount than the maize sold for; but the sale was a tortious act, and the defendants must therefore pay damages amounting to the sum agreed upon, and properly agreed upon, between the parties. My view of the facts is this: the goods were put into lighters with the hope that they might be taken on to Liverpool by some other ship, and that expectation was continuing until the defendants sent the telegram of the 27th of March, 1876, "have held survey, which reports grain unfit for shipment, will be sold to-morrow by public auction for benefit of whom it may concern." That is the first notice given to the plaintiff or to his representative at Constantinople that the maize will not be sent on, but that it will be sold, and, before the plaintiff's representative can express any opinion, it is sold. Under these circumstances, it is clear that the defendants had no authority to sell the maize. On the argument a difficulty was made as to what the defendants should do with the maize. It was asked, Was the maize to be kept in the lighters? Was it to be landed and warehoused, and if so, at whose expense? I think it is not necessary to give any answers to those questions, but it is sufficient to confine ourselves to the special circumstances of the case.

(1) Law Rep. 5 Q. B. 346; Law Rep. 7 Q. B. 225.

(2) Law Rep. 1 A. & E. 293.

(3) 6 E. & B. 471; 26 L. J. (Q.B.) 49.

(4) 2 Sprague, 35.

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The maize was in lighters, and the jury have found that there was no urgent necessity for the sale. The defendants could have communicated with the plaintiff, the owner of the maize, and might, therefore, have asked him whether it should be sold or not; but they gave him no opportunity to express his views on the transaction, and we cannot hold that the maize was lawfully sold.

As to the question of damages. The measure of damages is not what the maize realised at the sale, but what it would be worth to the owner if it had not been sold. If the question had been left to the jury, I am not sure that they would have found that it was worth more than it actually sold for, but it is probable that they might; and, therefore, when it was proposed to take the opinion of the jury on this question, the parties very properly and prudently agreed that the damages should be 100*l*. If, therefore, the sale was tortious, the damages must be increased to that amount.

The counter-claim is framed on the assumption that, in point of law, the plaintiff warranted that the maize was in a fit state to be carried when shipped. But there was no such warranty. We might admit that *Brass* v. *Maitland* (1) was correctly decided, and yet say that it does not govern this case. For the quality of the maize tendered for shipment was as much known to the one side as the other. Without, however, going further into the question, I am of opinion that there was no warranty.

As to the claim of freight pro ratâ, there can be no claim for such a thing unless the original voyage is given up by consent of both parties, and there is an acceptance of the goods at the intermediate port. This is the general rule, and it applies to the present case.

I am of opinion, therefore, that the plaintiff is entitled to succeed on this appeal.

BAGGALLAY, L.J. I entirely agree with the opinion of Bramwell, L.J., that the sale was wrongful. The law is clearly laid down in the case of *Australasian Steam Navigation Co.* v. *Morse.* (2) "The authority of the master of a ship to sell the goods of the

(1) 6 E. & B. 471; 26 L. J. (Q.B.) 49. (2) Law Rep. 4 P. C. at p. 228.

absent owner is derived from the necessity of the situation in which he is placed; and, consequently, to justify his thus dealing with the goods, he must establish, first, a necessity for the sale, and, secondly, inability to communicate with the owner and obtain his directions." As to the possibility of communicating with the owner of the cargo, there can be no doubt of it, for communications were made; the survey by Lloyd's surveyor was communicated, and on the 13th of March there was a communication of a further survey. The owner gave no consent to any sale, but protested against it, and always insisted that the maize should be forwarded. With regard to the notice of the 27th of March, it was a notice that the maize would be sold the next day, and there was no time for the owner to stop the sale. It is clear, therefore, that the sale was wrongful.

With regard to the counter-claim claiming freight pro ratâ, I have nothing to add. I ought also to say that I think that there was no such warranty as to the quality of the maize shipped as suggested.

BRETT, L.J. The question is, what verdict ought to be entered on the findings of the jury? We must look at the evidence only to ascertain what is the meaning of the findings, for the appeal is on the footing that the findings are correct.

Had the master authority to sell, and was the sale lawful or wrongful? On the present findings we must take it that the goods were of a perishable nature, and had an inherent vice at the time of shipment, and that was the cause of their being landed at Smyrna, and if something had not been done with them, they would have perished. The sale was a reasonable sale as regards the nature and condition of the goods, but it was a sale without the consent of the owner. The question therefore is, whether the master, under such circumstances, had authority to sell the goods? The first point made was that the authority of the master to sell goods is to be measured differently when the goods become perishable owing to their own inherent vice at the time of shipment, and when they become so from being damaged by perils of the sea. There is no ground for any such distinction. The authority of the master is the same whether the sale is rendered necessary from injury arising

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from the inherent vice of the goods or from sea damage. Primâ facie, the master has no authority to sell; he may have such authority under certain circumstances, which may arise from something happening to the ship, or from something happening to the cargo; but the law of England looks with jealousy on the master selling any part of the cargo without the consent of its owner, and it gives the master no authority, unless there is an urgent necessity for the sale.

Now an urgent necessity for a sale may arise from several causes. There may be an urgent necessity to sell goods, arising from the fact that if the goods are not sold they will perish, or that they will have to be kept in warehouses at great expense, so that as a matter of business it would be wrong to warehouse them; and it must be shewn that the master has no means of communicating with the owner, and taking his directions whether he shall sell them or not. But I think, whether the goods are of a perishable nature or not, if the master has an opportunity of communicating with the owner before they actually perish, he cannot sell without communicating with the owner and obtaining his directions: and if the master obtains directions, and the owner of the goods refuses his consent to a sale, the master cannot sell, although the goods are of a perishable nature. It is not necessary to lay down rules as to what the master should do in every case, but clearly he has no right to sell after receiving directions to the contrary. The jury here have found that there was no urgent necessity for a sale; therefore, in the present case the sale was wrongful.

I ought to mention that, according to the decision of *Australasian Steam Navigation Co.* v. *Morse* (1), if the only question put to the jury was whether the sale of the maize in the manner it was sold was a prudent measure, and the jury had found that it was, the defendants would have been entitled to succeed; for the jury would have been taken to have found that there was an urgent necessity for the sale, so as to give no time for communicating with the owner, but the particular questions left by the learned judge have ousted the defendants of this defence.

The law is correctly laid down in several cases decided by the

(1) Law Rep. 4 P. C. 222.

Privy Council, and though those decisions are not authorities which bind us, we are always glad to be able to follow them. The law is to be found in the cases *The Cargo ex Hamburg* (1) and *The Bonaparte* (2), where the judgment of Knight Bruce, L.J., in the former case is corrected thus: "If according to the circumstances in which he [the master] is placed it be reasonable that he should —or if it be rational to expect that he may—obtain an answer within a time not inconvenient with reference to the circumstances of the case there, it must be taken upon authority and principle that it is the duty of the master to do so, or at least to make the attempt." That is an express decision that before selling the goods the master must communicate with the owner. Then, in *Australasian Steam Navigation Co.* v. *Morse* (3), in a careful and elaborate judgment Sir Montague Smith says, "The general principles of law are not in dispute, viz., that the authority of the master of a ship to sell the goods of the absent owner is derived from the necessity of the situation in which he is placed; and consequently that to justify his thus dealing with the goods he must establish, first, a necessity for the sale; and, secondly, inability to communicate with the owner and obtain his directions. Under these circumstances, and by force of them, the master becomes the agent of the owner, not only with the power but under the obligation (within certain limits) of acting for him; but he is not in any case entitled to substitute his own judgment for the will of the owner, in the strong act of selling the goods where it is possible, as hereafter explained, to communicate with the owner, and ascertain his will."

In that case it is laid down, however unreasonable the owner may be, the master has no right to sell the goods against his will. If he has time to ascertain the owner's will, he is bound to communicate with him, and if he does not, the sale is wrongful. The defendant, in the present case, has failed to shew that there was so urgent a necessity as to justify a sale without the consent of the owner.

If the sale was wrongful, the amount for which the goods were sold at the intermediate port is not the true measure of damages,

(1) 2 Moo. P. C. (N. S.) 289. (2) 8 Moo. P. C. 459.
(3) Law Rep. 4 P. C. 222, at p. 228.

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but the value of the goods to the owner: that has been estimated at 100*l.*

The claim for pro ratâ freight is clearly not maintainable, and it is unnecessary to give any reasons for deciding against it.

As to the question of warranty, neither *Brass* v. *Maitland* (1) nor any other case shews that there is a warranty by the shipper that the goods shipped have no concealed defects at the time of shipment.

Appeal of the plaintiff allowed; cross appeal of the defendants dismissed.

Solicitors for plaintiff: *Tatham, Oblein, & Nash.*

Solicitors for defendants: *Field, Roscoe, & Co., for Bateson & Co., Liverpool.*

June 26.

[IN THE COURT OF APPEAL.]

THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF PENRYN *v.* BEST.

Market—Prescription to prevent Owners of Shops selling in them on Market Days.

12 L.D. 470
22 L.D. 300

The grant of a market, with the addition of the words "with all liberties and free customs to such a market belonging," does not imply a right in the grantee to prevent persons selling marketable articles on market days within the limits of the franchise.

Such a right may be gained by immemorial enjoyment or prescription.

The plaintiffs claimed to be entitled by prescription to a meat market within a borough, and as incident thereto they claimed the right to prevent butchers from selling meat in their own shops on market days within the limits of the franchise. The evidence was that from the time of living memory down to 1862 butchers who had shops in the borough closed them on market days, and resorted to the market and sold there, paying stallage: that in 1862 two butchers refused to do this, but on actions being brought submitted, and thenceforth paid toll for keeping their shops open on market days, and that the defendant had paid a similar toll for some years before 1875 when he declined to continue the payment:—

Held, reversing the decision of the Exchequer Division, that the evidence was sufficient to support the claim to prevent the owners of shops from selling in them on market days.

STATEMENT OF CLAIM alleged that the plaintiffs were owners in fee of a certain market, holden in the borough of Penryn, in the

(1) 6 E. & B. 471; 26 L. J. (Q.B.) 49.

county of Cornwall, on Thursdays and Saturdays in each week, for the buying and selling, amongst other things, of flesh meat, together with tolls, stallage, and other perquisites and profits to that market appertaining; and all persons selling flesh meat on Thursdays and Saturdays within the borough ought of right to sell the same within the market, and not in any private shop without payment to the plaintiffs of the tolls, stallages, and other perquisites and profits of the market; but that on Saturday, the 4th of December, 1875, and from that date, on each Saturday thereafter, the defendant exposed for sale in his shop within the limits of the borough, flesh meat, and refused to pay the plaintiffs any of the tolls, stallages, or other perquisites and profits of the market, and caused them to lose the tolls, and thereby disturbed the plaintiffs' market.

The action was tried before Lord Coleridge, C.J., at the Middlesex Michaelmas Sittings, 1876.

At the trial it appeared that in 1259 Henry III. granted to the Bishop of Exeter a market at the manor of Penryn, and a charter of Richard II., in 1380, recites by inspeximus the former charter, and grants and confirms unto the then Bishop of Exeter "that he and his successors for ever may have a market in his manor of Penryn in Cornwall every week on Monday," and it orders that the bishop and his successors may have the aforesaid market and a yearly fair, "with all liberties and free customs appertaining to a market and fair of this kind."

The borough of Penryn was incorporated by charter of James I. in 1621. The Bishops of Exeter at various times leased the lordship of Penryn Burrough, and the Town Burrough and Burgage of Penryn, with all the appurtenances, among which were mentioned markets, to trustees for the corporation, and in 1820 to the corporation direct, who in 1875 became purchasers (from the Ecclesiastical Commissioners) of the manor.

On behalf of the plaintiffs it was proved by the town clerk that since 1848, when he was appointed to his office, the meat market had been held on Saturday and not on Monday, and that the butchers in the borough had closed their shops on Saturdays and had sold their meat in the market, in stalls provided by the council for which 1*s.* 6*d.* was charged as stallage. It was also proved by

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J. Robins, who was sixty-three years of age, that as far back as he could remember, the usage as to the meat market in the borough had been such as was deposed to by the town clerk. This witness was not cross-examined, and the evidence on this point adduced by the plaintiffs was not sought to be controverted. It was also proved that in 1862 there was a dispute between the plaintiffs and two butchers who sold meat in their shops on market days, but refused to pay 1*s.* 6*d.* to the council for doing so. They were accordingly sued for disturbance of franchise of market, but they submitted to verdicts, and paid the toll demanded. Afterwards these two and the other butchers in the borough paid toll on every occasion on which they sold in their own shops on market days. The defendant himself paid the toll for some years, but in 1875 he declined to do so, or to close his shop on Saturdays.

A verdict was found by direction of the learned judge for 20*s.* for the plaintiffs, who moved to enter judgment for that amount.

Jan. 11. *Herschell, Q.C.*, and *Charles, Q.C.*, for the plaintiffs. *Murphy, Q.C.*, and *Wormald*, for the defendant.

Cur. adv. vult.

Feb. 4. The judgment of the Court (Cleasby, B., and Hawkins, J.) was delivered by

CLEASBY, B. This is an action for the disturbance of the market of the plaintiffs. The plaintiffs are no doubt entitled to have a meat market on Saturdays, and the defendant on a Saturday, when the market was held, sold meat in his own private shop in the town, at some distance from the place where the market was held. The question is, whether the franchise of the plaintiffs was of such a nature that they could maintain an action against the defendant. Similar questions have arisen before, and two conclusions may be considered as settled by authority.

First, that the mere grant of a market does not of itself confer the right to prevent persons from selling on market days in their private houses, though within the town or manor where the market may be held. This was decided in the case of *Mayor of Maccles-*

field v. *Chapman*. (1) It is pointed out in the judgment that an old case, the *Prior of Dunstable's Case* (2), had been erroneously supposed to decide the contrary. It may also be considered as decided by the case of *Earl of Egremont* v. *Saul*. (3) We feel bound by these authorities, although dicta may no doubt be found to the contrary. See the case of *Mosley* v. *Chadwick* (4), referred to in the note.

The second conclusion by which we are bound is that such a right as is contended for may be acquired by immemorial enjoyment or prescription. For this there are two decisions, *Mosley* v. *Walker* (5) and *Mayor of Macclesfield* v. *Pedley*. (6)

It is not necessary to say anything about the effect of a modern grant, or a grant since the time of legal memory, of a market, with this additional incident of preventing persons from selling in their own houses within the limits of the franchise. The question does not arise in the present case, but there are obvious objections of a serious nature to the grant of a franchise which prevents persons who were selling meat at the time in their private houses from continuing to do so.

The facts brought before us in the present case are as follows:— We understand that the verdict of the jury was not taken upon any particular question, but, upon the evidence being given, a verdict was taken for the plaintiffs generally, it being considered that there was sufficient evidence to warrant that verdict. But the Court was, upon the case being brought before them, to deal with the facts and say what was the proper conclusion.

Evidence was given of a charter in the reign of Henry III., A.D. 1259, by which the King granted that the Bishop of Exeter and his successors might have a market in his manor of Penryn every week, on Monday, and also in every year a fair of three days' duration on days named, and that they should have the aforesaid market and fair with all liberties and free customs appertaining to such a market and fair, except that they were not to be to the nuisance of neighbouring markets and fairs. Proof of this

(1) 12 M. & W. 18.
(2) 11 H. 6, f. 19 a, and cited in City of London's case; 8 Rep. 127, a.
(3) 6 Ad. & E. 924.
(4) 7 B. & C. 47, n. (a).
(5) 7 B. & C. 40.
(6) 4 B. & Ad. 397.

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was given by a charter of confirmation upon an inspeximus in the reign of Richard II. We think that, having regard to these two charters, there is no sufficient ground for regarding the charter of Henry III., which refers to no previous grant, as a confirmation of any previous grant of a market, notwithstanding the use of the not unusual words "grant and confirm" at the commencement.

A number of leases were produced from the bishop to the borough of Penryn of property in the borough, and all these leases contained the general words "together with all markets," but there was no particular reference in any lease to the market which formed the subject of the grant by the Crown to the Bishop of Exeter, or to the charter of Henry III. These leases were granted from time to time, and may be said to have brought the right of market down to the time when the borough became purchasers of the bishop's rights from the Ecclesiastical Commissioners. One of the leases, that of 1745, contained an indorsement of delivery of seisin of the guildhall and market houses. This is of importance as shewing all rights of the plaintiffs to the market were derived from the bishop.

There was also evidence of the holding by the plaintiffs and their predecessors in title of a meat market on Saturdays, so far as living memory goes. But there was no evidence to connect in any way the market so held with the Monday market granted in 1259.

There was further evidence that there were three or four butchers who had shops in the town, and that it had been usual for these butchers on the Saturdays when the market was held to close their shops and go and sell in the market, and that this had been done till 1862, and it was further proved that in that year two butchers opened their own shops on Saturdays and disputed the right of the corporation to prevent it, and that writs having been issued against them they submitted and paid the costs, and that they have since had their shops open on the Saturdays and paid the plaintiffs toll, which must mean, no doubt, the stallage which the plaintiffs would have been entitled to if the butchers had occupied stalls in the market house.

Authorities were referred to for the purpose of shewing that no right to tolls was acquired by the charter referred to, particularly

Heddy v. *Wheelhouse* (1), but the real question in this case is not the right to tolls eo nomine, but the right to compel the defendant to sell in the market house, if at all, by which the plaintiffs would acquire a right to stallage as owners of the soil. And the real question is whether the evidence establishes any such right.

The facts are peculiar, because we have a charter for a market on Monday, and the proof is that no market has ever been held on Monday, but there is proof of a meat market having been held on Saturday.

If the proof had been of a charter for a meat market on Saturday in the terms of the present charter, the grant being of a market and fair, with all liberties and free custom to such a market and fair belonging (the words in the original, no doubt, being "cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi mercatum et feriam pertinentibus"), as in the case of *Earl of Egremont* v. *Saul* (2), we should have felt satisfied that there is not sufficient to justify us in reading the grant as a grant of a market with the incident of preventing persons from selling meat in their own houses away from the market. As this incident is not a liberty belonging to a market, it would be enlarging the franchise beyond the words, and would be at variance with *Earl of Egremont* v. *Saul*. (2) But the plaintiffs rested their case mainly upon another ground, viz., that there was sufficient evidence to warrant the conclusion of a right by prescription to hold a market on Saturday with this incident, and it was said that, if there was sufficient evidence of this enjoyment, the plaintiffs ought not to be worse off because there was in 1259 also an express grant, which had vested in them, of a Monday market. The cases of *Mosley* v. *Walker* (3) and *Mayor of Macclesfield* v. *Pedley* (4) are referred to as shewing that such a right might be so gained, but upon referring to these cases, and the evidence produced in the present case, we find a very great difference.

We cannot examine in detail the evidence in those cases upon which the jury found in favour of the right, but it appears to us

(1) Cro. Eliz. 558, 591.
(2) 6 Ad. & E. 924.
(3) 7 B. & C. 40.
(4) 4 B. & Ad. 397.

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that if the same question had been left to the jury in this case, they ought upon such different evidence to come to a different conclusion. The evidence in the present case, except as to the existence of a market, only dates from the year 1848, and from that time to 1862 the only proof is that on the market day the butchers closed their shops and resorted to the market. This is entitled to very little consideration as shewing that the butchers were under an obligation to close their shops; it is equally reconcilable with its being more to their advantage to sell in the market than at home. And it only dates from 1848. In 1862 they claimed the right to keep their shops open on Saturdays. Two actions were, however, brought and submitted to by two butchers, and since that time the butchers who have opened their shops on Saturdays have paid toll until the present defendant disputed the right. This evidence is, in our opinion, far too weak to justify the conclusion of the right being gained by immemorial enjoyment, more especially when taken in connection with a charter being granted in 1259 for a market with ordinary incidents. The enjoyment of the right claimed is, properly speaking, only from 1862, as we consider the attendance of the butchers at the market on market days as proving little or nothing. The actions brought afterwards and submitted to, though proof of enjoyment, are no further evidence against the defendant, and the proof of payment of toll even by the defendant (as one of the witnesses says he believes) would not be conclusive. To justify the conclusion of immemorial enjoyment the evidence ought to go further back, and be like such as was given in the two cases last referred to, and the effect of the evidence is also weakened by the demand of the plaintiffs (which was acceded to) being for tolls which they were certainly not entitled to, their only right being to stallage as owners of the soil of the market. The payments might be made under the belief that the plaintiffs were entitled to tolls, and not as an acknowledgment that the plaintiffs were entitled to make them close their shops.

We have considered the case upon the merits, and not with reference to the particular claim set up in the statement, viz., to tolls and stallages for selling out of the market, which seems open to objection, but might have been amended.

For the above reasons we think the plaintiffs have not established the right claimed, and that there must be judgment for the defendant.

Judgment for the defendant.

The plaintiffs appealed.

June 22. *Herschell, Q.C.*, and *Charles, Q.C.*, for the plaintiffs. *Murphy, Q.C.*, and *Wormald*, for the defendant.

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June 26. The following judgments were delivered :—

BRAMWELL, L.J. I am of opinion that this appeal must be allowed. We do not differ from the Exchequer Division on the point of law, but upon a question of fact, as to which we think there has been a misapprehension in the Court below.

Now, the first question that arises here is, Have the plaintiffs shewn a title to a Saturday market? I think we ought to hold that the plaintiffs have a title to such a market. We can have no doubt that such a market has been held as long as living memory goes, and there is nothing to shew that there is not a right to a Saturday market, except certain charters which shew they once had a right to a Monday market. It is obvious they may have a right to hold two markets. The Crown may have granted the charter of the one, as well as of the other, or it may have made a grant of the Saturday market on the ground of the Monday market having got into desuetude and not being held. It is a most convenient thing that every supposition, not wholly irrational, should be made in favour of long-continued enjoyment. Probably if these plaintiffs were attempting to hold a Monday market as of right, the most vigorous efforts would be made to shew they had no right to do so. I think, therefore, we ought to hold the plaintiffs have shewn a title to a Saturday market.

Then the next question is this : Was there such a right attached to the market as was necessary to enable the plaintiffs to maintain this action? It was contended that if there was a modern grant creating a market in a particular place, that would not, of itself, entitle the grantee to shut up shops. But, on the other hand, authorities were cited, and it was stated to be law that a person

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entitled to a market by prescription, not only has certain rights within the place where the market is held, but may also say to persons within a certain area, "You must shut up your shop when my market is held, or you must pay me some compensation for selling in your shop." I take it that is established law, and can only be altered by the legislature, or, at all events, by the ultimate Court of Appeal, after the number of years it has been in existence. I think that possibly at the time the charter was granted, the whole area of the manor or town of Penryn was in the grantee of the market, and he could hold it where he liked; and in truth he could be considered as holding it anywhere, although what we may call the "focus" of the market might be in one place. The law is as I have stated, and it is competent for the plaintiffs to maintain such a right upon sufficient evidence. Now, upon this point we concur with the Court below, and the only question is, whether they were right in the conclusion they drew from the evidence? It seems to me they would have been right if the facts had been as they have assumed in the judgment. I understand the assumption in the judgment is, that the earliest evidence of any such exclusive right as the plaintiffs were asserting was in the year 1848: but that really is not so; on the contrary, the evidence is this, that as long as living memory can trace back (and one of the witnesses called was sixty-three years of age, therefore we may assume he may well remember for fifty years back, or possibly more), the state of facts has existed upon which the plaintiffs rely. There is evidence that as long as living memory can trace, when this market was held all the butchers' shops in Penryn were shut up; and the butchers, even those who occupied the shops within a few yards of the market-house, not only shut up their shops, but went into the market and sold their meat, as any other person going into the market to sell their articles would have done. It is said by Mr. Murphy, that of itself proves very little, because, as the market would be the place to which the intending purchasers would throng, butchers would naturally go there, and shut up their own shops. I cannot help thinking that, though a butcher might like his stall in the market, he might also keep his shop, which was within a few yards of it, open; but every one in Penryn shut their shops; I think that is a very remarkable thing,

and cannot be accounted for, if such a right as the plaintiffs contend for did not exist. Further, there is this, in the year 1862 there were two recalcitrant butchers, who resisted the right of the corporation, and the corporation then insisted upon their right, and these butchers acquiesced and paid the dues claimed. They did not shut up their shops, they continued to have them open, but upon the terms of making compensation to the plaintiffs upon the footing that the plaintiffs were entitled to the right they now claim. This is open to the observation was it not much better for them to pay the trifle they had to pay than run the risk of litigation with a corporate purse? But it is met by this, that at the present moment this defendant does not think so, and I do not know why we should say his predecessors in the butcher trade may not have acquiesced in it, because they knew the corporation were right. But suppose it is a piece of evidence which admits of the observation Mr. Murphy made, what else can a plaintiff prove in such a case? He cannot prove more than that he has asserted his title when the occasion has arisen, and that assertion has been acquiesced in. If evidence of title were to be met by such arguments as this, I am not sure it would not weaken the best title, because, when a man is found trespassing, and being pursued pays a small sum in respect of the trespass, and the owner of the property afterwards relies upon this as proving possession, it might be said, "It was much better for the man to pay you a few shillings than to contest your right." Assuming, for the reasons I have given, that there was a good Saturday market here, and assuming, as I think we are bound to do, there might be such a right annexed to the market as the one claimed, it seems to me the plaintiffs have proved their case, and I agree that the evidence, when appreciated, is stronger than in the case of *Mosley* v. *Walker*. (1) As I have said before, the judgment of the Exchequer Division was founded upon this, that the earliest evidence of enjoyment was in 1848. If that had been so, and it had been left uncertain what had been the practice of the butchers and the corporation prior to 1848, and within the time of living memory, I should have thought it was a very different case, but the evidence being, as I have pointed out, it seems to me we ought to give judgment for the plaintiffs.

(1) 7 B. & C. 40.

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BAGGALLAY, L.J. I am of the same opinion. I entirely assent to the principles of law as laid down in the Exchequer Division; first, that the mere grant of a market does not of itself confer a right to prevent persons selling in their shops on market days within the town or manor where the market may be held; and, secondly, that such right may be acquired by immemorial enjoyment or prescription. I agree in all the conclusions which the Exchequer Division drew from the facts, with the exception to which the Lord Justice has referred. It appears to me that the evidence shews that as far back as living memory went the butchers' shops have been closed on Saturday, and this is sufficient to establish the right claimed by the plaintiffs.

THESIGER, L.J. I am of the same opinion. Inasmuch as there is no difference between the view taken in this Court and that taken in the Court below as to the law, the whole question resolves itself into what was proved at the trial; and I entirely agree in what has fallen from Bramwell, L.J. I think, on the evidence adduced before him, that Lord Coleridge, C.J., was right in directing the verdict to be entered for the plaintiffs.

Judgment reversed.

Solicitors for plaintiffs: *Gregory, Rowcliffe, & Co., for G. A. Jenkins, Penryn.*

Solicitors for defendant: *Harris & Powell, for R. Dobell, Junr., Truro.*

[IN THE COURT OF APPEAL.]

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July 2.

CRUSH AND ANOTHER *v.* TURNER.

Commons Inclosure—Private Ways, Extinguishment of—8 & 9 *Vict. c.* 118, *ss.* 16, 68—*Court of Appeal, Jurisdiction of—Judicature Act*, 1873, *s.* 45—*Appellate Jurisdiction Act*, 1876, *s.* 20.

An appeal lies to the Court of Appeal from the decision of a divisional court, if special leave to appeal is given under the Judicature Act, 1873, s. 45, upon a case stated by a county court judge under 13 & 14 Vict. c. 61, s. 14, notwithstanding the Appellate Jurisdiction Act, 1876, s. 20.

H. previously to the year 1869 was seised of lands in the parishes of W. and B., in which there were waste lands about to be inclosed under the General Inclosure Act, and portions of which would be allotted to him in respect of the ownership of his lands. H. sold his lands, expressly reserving the allotments. The defendant became the purchaser of some of the lands, which were duly conveyed to him, the deed containing the general words as to ways, paths, &c. Some of the waste land was situate between the land sold to the defendant and the high road, and over this waste land there were trackways which had been used by the occupiers of the land conveyed to the defendant for forty years and down to the time of the award under the Inclosure Act, which was made on the 5th and confirmed on the 21st of July, 1871. On the 14th of July, 1870, H. sold the allotments intended to be made to him to C., under whom the plaintiffs claimed, and they were conveyed to C. in March, 1871. The inclosure award, while setting out in the plan attached to the award certain ways over the lands inclosed, did not set out any ways over the allotments sold to C.:—

Held, that by virtue of s. 68 of 8 & 9 Vict. c. 118, which directs private ways to be set out over allotments and stops up all other private ways, the trackways which prior to the award existed over the land allotted to H. were extinguished.

APPEAL from the judgment of the Exchequer Division, that Court being equally divided, on a case stated by a county court judge under s. 14 of 13 & 14 Vict. c. 61.

Action for trespass to recover damages for wrongfully entering the plaintiffs' lands, pulling down the fences, and destroying growing crops.

Defence, that the defendant did the acts complained of in the assertion of certain rights of way to which he was entitled over the land of the plaintiffs.

The plaintiffs derived their title under the will of Robert Crush, and by that will, proved on the 2nd of May, 1875, the property was vested in them. R. Crush derived his title under a deed of conveyance in fee simple from J. A. Hardcastle, dated the 29th of

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November, 1871. J. A. Hardcastle, who was previously to the year 1869 seised of certain farm lands and hereditaments in the parishes of Writtle and Roxwell, in the county of Essex, derived his title to the land on which the alleged trespass above mentioned was committed under an award made by the Inclosure Commissioners for the inclosure of waste lands in the parishes of Writtle and Roxwell. This award, dated the 5th of July, 1871, was finally confirmed by the commissioners on the 21st of July, 1871. By that award an allotment was made to J. A. Hardcastle in respect of certain freehold lands then belonging to him called Wards, situate in the parish of Writtle, containing 185*a.* 2*r.* 5*p.* The lands in question were delineated on two plans, one being a copy of that portion of the map forming part of the commissioners' award, the other being a copy of a plan set out on the deed of conveyance to the defendant. Upon the first of these plans the pieces of waste land allotted to J. A. Hardcastle in respect of the farm called Wards, are numbered 215, 246, and 246a respectively. Some time prior to the year 1869, proceedings under the General Inclosure Act had been going on for the inclosure of the waste lands above mentioned. In the year 1869, J. A. Hardcastle caused certain freehold lands and hereditaments to be put up to sale by auction, at the same time expressly reserving the allotments to be made of the waste lands before mentioned. At this sale the defendant became the purchaser of lot 2, being Ewson's Farm, and the same was conveyed to him by a deed dated the 29th of September, 1869, and which, after setting out the parcels by proper descriptions and abuttals, proceeded as follows :— "Together with all lands, buildings, yards, gardens, orchards, walls, fences, hedges, ditches, timber, and timber-like trees, woods, underwoods, ways, paths, passages, drains, watercourses, lights, easements, privileges, advantages, and appurtenances to the said farm lands and hereditaments hereby conveyed, or any of them belonging or in any wise appertaining or held, used, or occupied therewith, or known, accepted, or reputed as part, parcel, or member thereof." And the defendant also became the purchaser of lots 4 and 5, being Brickhouse Farm and Newhouse Farm, and the same were conveyed to him by a deed also dated the 29th of September, 1869, and, which after setting out the parcels by proper

description and abuttals, contained similar general words as those in the deed conveying Ewson's Farm. Previously to, and at the time of these deeds of conveyance, there were certain trackways over the allotments of waste in question, viz., Nos. 215, 246, and 246a. These trackways had been used by the owners and occupiers of the property so conveyed to the defendant for upwards of forty years as a means of access to and from part of the property and the high road, and such user was continued down to the time of the award by the defendant who continued to assert his right to such user after the award, but such claim after the award has always been disputed by the plaintiffs. On the 14th of July, 1870, J. A. Hardcastle caused the allotments before mentioned, including those numbered 215, 246, and 246a respectively (together with other property), to be put up to auction under certain particulars of sale, which stated that the allotments of the waste lands were sold subject to the regulations set out in the award as to fences, and by the 9th condition of sale it was provided that "Every lot is believed and shall be taken to be correctly described, and is sold subject to all chief and other rents, quit-rents, suits, fines, heriots, and incidents of tenure, rights of way and water, and other easements, if any, chargeable or subsisting thereon, whether mentioned in these particulars or not."

R. Crush became the purchaser of the allotments numbers 215, 246, and 246a, subject to the conditions of sale.

The final award of the commissioners, which is dated the 5th of July, 1871, was confirmed on the 21st of the same month, and under it the above-mentioned allotments numbered 215, 246, and 246a respectively, were allotted to J. A. Hardcastle, and by him conveyed to R. Crush on the 29th of November, 1871, by a deed describing them by their boundaries and granting them with the appurtenances and free from all incumbrances by the grantor.

It was proved in evidence that there were other means of access to the lands of the defendant (though not so convenient as to some portion) than those now claimed by him, and it was found as a fact that they were not ways of necessity. It was also admitted that proper notices of the meetings of the commissioners for the purpose of hearing objections to the proposed award had been published, and that these meetings had been held after the

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defendant had become the owner of the lands purchased by him of J. A. Hardcastle in the manner above mentioned; that the defendant omitted to take the proper steps then or subsequently to have the trackways now claimed by him set out upon the map forming part of the award of the commissioners, and that the map or plan was published and finally confirmed without these trackways or any of them being set out upon it.

The county court judge decided in favour of the plaintiffs assessing the damage at 10*l*. The question was whether, upon the facts stated, the judgment of the county court judge was right.

The Exchequer Division being equally divided in opinion, the judgment of the county court judge in favour of the plaintiffs stood unreversed. The Exchequer Division gave the defendant special leave to appeal.

The defendant appealed.

May 30. *Crome*, for the plaintiffs. There is a preliminary objection to the hearing of this appeal. The case for the opinion of the Court is stated under s. 14 of 13 & 14 Vict. c. 61. The appeal to the superior Court under that section was final. By s. 45 of the Judicature Act, 1873, all appeals from petty or quarters sessions, from a county court, or from any inferior Court, which might have been brought to any Court whose jurisdiction is transferred to the High Court of Justice, may be heard and determined by divisional courts, and the determination of such appeals shall be final unless special leave to appeal shall be given: then by s. 20 of the Appellate Jurisdiction Act, 1876, where by any Act of Parliament it is provided the decision of any Court, the jurisdiction of which is transferred to the High Court, is to be final, an appeal shall not lie. This section impliedly repeals the power to give leave to appeal contained in s. 45 of the Judicature Act, 1873, and as under 13 & 14 Vict. c. 61, s. 14, the appeal from the county court is final, no appeal lies to this Court from a divisional court.

Philbrick, Q.C., and *Tindal Atkinson*, for the defendant. Under s. 45 of the Judicature Act, 1873, if leave be given to appeal, a right of appeal exists. Sect. 20 of the Appellate Jurisdiction Act, 1876, refers to the right to appeal given in s. 19 of the Judica-

ture Act, 1873, and leaves s. 45 untouched. Sect. 20 means that when by the previously existing state of the law a decision of a superior Court was final, there shall be no appeal from a divisional court unless there is a power to allow an appeal; but s. 45 contains such a power, therefore leave being given the decision of the divisional court is not final, and the right to appeal is therefore not taken away.

BRETT, L.J. It seems to me that the appeal lies. Where there was an appeal from the county court under s. 14 of 13 & 14 Vict. c. 61, under that section the decision of the superior Court would be final, and if so s. 20 of the Appellate Jurisdiction Act would have prevented any further appeal. But s. 45 of the Judicature Act, 1873, modifies the County Court Act, and gives a further appeal when the County Court Act says there shall be no appeal. It repeals that part of the County Court Act which said the decision of the superior Court shall be final, and says it shall be final "unless special leave to appeal from the same to the Court of Appeal shall be given." In 1876, therefore, when the Appellate Jurisdiction Act, 1876, passed, the statutory provisions with regard to appeals from county courts were these: that the decision of the divisional court was final unless leave to appeal was given. How, then, is s. 20 of the Appellate Jurisdiction Act to be read? It is to be read "where by enactment existing at the time this Act is passed, it is provided that the decision of the High Court is to be final, there shall be no appeal." That does not apply to the present case, because leave to appeal has been given, and where leave is given the decision is not final.

COTTON, L.J. Some difficulty appears to be caused by s. 20 of the Appellate Jurisdiction Act, 1876. Section 45 of the Judicature Act, 1873, was intended to modify the enactments with regard to appeals under the County Court Acts. Appeals which were final under those Acts continued to be final unless leave to appeal was given. Then came s. 20 of the Appellate Jurisdiction Act, 1876, which enacted where by Act of Parliament it is provided that the decision is to be final an appeal shall not lie: but by s. 43 special leave to appeal may be given; in that case the decision of the

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divisional court is not final. I am of opinion that we are bound to entertain the appeal.

THESIGER, L.J. I have no doubt whatever in this case. The question is whether s. 20 of the Appellate Jurisdiction Act, 1876, has repealed in part s. 45 of the Judicature Act, 1873. In the first place s. 20 does not apply only to appeals from county courts; it is a general enactment, and we cannot make a general provision repeal a particular section. The mode in which it is said s. 20 ought to be read requires the insertion of words which are not in the Act—it would have to be read: "where by Act of Parliament prior to the existence of the Judicature Acts it is provided;" but those are not the words of the section, they are "where by Act of Parliament it is provided." The Judicature Act, 1873, is a separate enactment, and at the time the Appellate Jurisdiction Act, 1876, was passed there was an Act of Parliament by which it was provided that the decision of the High Court should not be final, but that there should be an appeal if leave were given. I read s. 20 as meaning where by any statute existing at the time when the Act of 1876 was passed it was declared that the decision of a divisional court should be final, there should be no appeal; the present case does not fall within that interpretation of the section: and it follows that there is an appeal.

The appeal was then heard on the merits.

Croome, for the plaintiffs.

Philbrick, Q.C., and *Tindal Atkinson*, for the defendant, cited *Grubb* v. *The Inclosure Commissioners.* (1)

The arguments sufficiently appear in the judgment (2).

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(1) 30 L. J. (C.P.) 155.

(2) By 8 & 9 Vict. c. 118, s. 16: "That for the purposes of this Act the persons interested in land subject to be inclosed under this Act, or otherwise subject or to become subject to the provisions of this Act, shall be deemed to be the persons hereinafter mentioned and no others: (that is to say) the persons who shall be in the actual possession or enjoyment of any such land or any part thereof, or any common or common right thereon, or any manor of which such land or any part thereof shall be waste, or who shall be in the actual receipt of the rents and profits of such

July 2. The judgment of the Court (Brett, Cotton, and Thesiger, L.JJ.) was delivered by

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THESIGER, L.J. The question to be decided upon the appeal is, whether the defendant is entitled to certain rights of way claimed

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land or part thereof, common, common right, or manor respectively (except any tenant for life or lives, or for years, holding under a lease or agreement for a lease on which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and except any tenant for years whatsoever holding under a lease or agreement for a lease for a term which shall not have exceeded fourteen years from the commencement thereof and except any tenant from year to year, at will, or sufferance), and that without regard to the real amount of interest of such persons; and in every case in which any such land, common or common right, or manor shall have been leased or agreed to be leased to any person or persons for life or lives or for years, by any lease or agreement for a lease in which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and in every case in which any such land, common or common right, or manor shall be in the possession of a tenant from year to year at will or sufferance, or shall have been leased or agreed to be leased for a term which shall not have exceeded fourteen years from the commencement thereof, the person who shall for the time being be entitled to the said land, common or common right, or manor in reversion, immediately expectant on the term created or agreed to be created by such lease or agreement for a lease, respectively, or subject to the tenancy from year to year at will or sufferance, shall be deemed for the purposes of this Act to be the person interested as aforesaid, in respect of such land, common or common right, or manor; and in every case in which any such land, common or common right, or manor as aforesaid shall have been leased or agreed to be leased to any person for life or lives or for years, by any lease or agreement for a lease in which a rent less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved and of which the term shall have exceeded fourteen years from the commencement thereof, the person who shall, for the time being, be in the actual receipt of the rent reserved upon such lease or agreement for a lease, shall jointly with the person who shall be liable to the payment of such rent of such land, common or common right, or manor, be deemed for the purposes of this Act to be the person interested in respect of such land, common or common right, or manor, respectively." . . .

By s. 68, the valuer acting in the matter of any inclosure shall and may set out such private or occupation roads and ways through the lands to be inclosed as he shall think requisite for the use of the persons interested in such lands or any of them; and any expenses which the valuer may incur relative to the setting out or formation or completion of such private roads and ways or any of them shall, unless the valuer shall otherwise direct, be paid in the same manner as the other expenses of the inclosure; and such expenses of the formation and completion of such private roads and ways as the

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by him over land belonging to the plaintiffs. Both parties derive title from a Mr. Hardcastle, who previously to the year 1869 was seized of lands and hereditaments in the parishes of Writtle and Roxwell, in the county of Essex. In these parishes there were certain waste lands, for the inclosure of which proceedings under the General Inclosure Act had been going on for some time before 1869, and under which it was contemplated that Mr. Hardcastle, in respect of his ownership of the lands and hereditaments above referred to, would receive allotments. In that state of circumstances Mr. Hardcastle caused some of his lands and hereditaments to be put up for sale by auction expressly reserving the allotments to be made to him of the waste lands. At the sale the defendant became the purchaser of some of the lots, which were conveyed to him by two deeds dated the 29th of September, 1869. Each of such deeds, after setting out the parcels by proper description and abuttals, proceeded as follows:—[The Lord Justice read the general words contained in the deed.]

Between the lands conveyed to the defendant and the high road to Roxwell some slips of land, forming part of the waste lands to be inclosed, were interposed, and over them there were trackways which had been used by the owners and occupiers of the property conveyed to the defendant for upwards of forty years, as a means of access to and from part of the said property and the high road, and which were used by the defendant without dispute down to the time of the award under the Inclosure Act, which was provisionally made on the 5th of July, and confirmed on the 21st of July, 1871. In the meantime, that is to say, on the 14th of July,

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valuer shall direct shall be borne by, and after the formation and completion of such private roads and ways the same shall be maintained and kept in repair by and at the expense of the owners and proprietors for the time being of the land inclosed or such of them and in such shares and proportions and in such manner as the valuer shall direct; and after such private roads and ways shall have been set out and made, the grass and herbage arising thereon shall for ever belong to and be for the use of such persons interested in the lands to be inclosed as the valuer shall direct, and in the absence of such direction shall belong to the proprietors of the land to be inclosed which shall next adjoin the roads and ways on either side thereof as far as the crown of the road; and after such setting out as aforesaid all private or occupation roads or ways over, through, and upon the lands to be inclosed which shall not be set out as aforesaid shall be for ever stopped up and extinguished.

1870, Mr. Hardcastle caused the allotments intended to be made to him to be put up to auction, and R. Crush, under whom the plaintiffs' claim title as devisees, became the purchaser of three of the allotments subject to the conditions of sale, and such allotments were conveyed to him by Mr. Hardcastle on the 29th of November, 1871. The inclosure award, while setting out as appears by the plan attached to the award certain ways over the lands inclosed, did not set out any ways over the said allotments purchased by Crush; and on the part of Crush and the plaintiffs it was contended that by virtue of s. 68 of 8 & 9 Vict. c. 118, any rights of way which might have existed prior to the confirmation of the award were from that time extinguished. The defendant, on the other hand, contended that the trackways to which reference has been made were not affected by the award, at least between him and the persons claiming under Hardcastle; and having entered on the plaintiffs' allotments in assertion of his alleged rights of way an action of trespass was brought by the plaintiffs in the county court of Essex.

The learned judge of the county court decided in favour of the plaintiffs and gave judgment for them; and upon appeal to the Divisional Court of Exchequer, the Court being equally divided in opinion, the judgment stood. We have come to the conclusion that such judgment was right and should be affirmed. Our reasons may be stated as follows. In the first place, it appears to us that the plaintiffs' right to have their allotments free from any ways not set out by the inclosure award would be, if they did not derive title from Hardcastle, tolerably plain. It is urged on the part of the defendant that the section above referred to only enables the valuer acting in the matter of any inclosure to set out private ways for the use of persons obtaining allotments under such inclosure, and that the section, while it can give no ways to other persons, can take no rights of way from them. There is no doubt that the words "for the use of the persons interested in such lands or any of them," which are found in s. 68, when coupled with the definition of persons interested in land subject to be inclosed under the Act given in s. 16, create some difficulty in the construction of the first-mentioned section; but, on the other hand, the very object which the Act has in view, and the

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means given by the Act for carrying that object into effect, point to the words at the end of s. 68 as having been used in the wide sense which their natural signification imports. The main object of the Act, as its preamble recites, is to facilitate the inclosure and improvement of commons and other lands, subject to rights of property which obstruct cultivation and the productive employment of labour. That object is effected, speaking generally, by schemes of inclosure under which rights of property are extinguished and the land freed from them is allotted, and it would be manifestly inconvenient if all rights of way could not be dealt with by the valuer intrusted with the inclosure scheme. When the provisions of the Act are looked at, it appears that the valuer's powers in respect of rights of property are intended to be of the most ample kind. Sect. 46 provides that the valuer shall hold meetings for the examination of claims and otherwise in the matter of the inclosure; s. 47 provides that all persons claiming "any common or other right or interest, or any land proposed to be inclosed," shall deliver such claim in writing to the valuer; and s. 106 provides for the making of allotments in full bar of, and satisfaction and compensation for, lands, rights of common, and all other rights and properties whatsoever, not excepted by the Act or the award, and concludes by enacting "that from and immediately after the confirmation of the award by the commissioners, or at such earlier time as the valuer, with the approbation of the commissioners, shall by notice on the church door direct, all rights of common, and all rights whatsoever by the inclosure intended to be extinguished, belonging to or claimed by any person whomsoever in or upon such lands shall cease, determine, and be for ever extinguished." These sections shew the general character of the valuer's powers as regards rights of property in or upon the land to be inclosed, and indicate an intention to give him complete control over all rights not specifically excepted. But as regards ways, both public and private, there are further provisions. Sect. 62 enables the valuer to set out and make public ways over the land to be inclosed, and to stop up, divert, or alter any existing ways passing through such land, subject, in respect of turnpike roads, to the consent of the majority of the trustees, and in respect of other public roads

to the giving of certain notices and to an appeal to quarter sessions, for which provision is made in ss. 63 and 64. As regards public ways, therefore, there is no exception from the jurisdiction of the valuer. No reason can be suggested why his jurisdiction should not be equally wide in the case of private ways. Sect. 68 then provides that the valuer "may set out such private or occupation roads and ways through the land to be inclosed as he shall think requisite for the use of the persons interested in such lands or any of them." Stopping at these words, I think that they may fairly be read as including, under the expression "persons interested in such land," persons who might under s. 47 claim any common or other right or interest in the land to be inclosed, and that those words are wide enough to include persons in the position of the defendant claiming rights of way over the land. This view is strengthened by the concluding words of s. 68, which are these: "And after such setting out as aforesaid, all private or occupation roads or ways over, through, or upon the lands to be inclosed which shall not be set apart as aforesaid shall be for ever stopped up and extinguished." But whatever doubt may exist as to the proper construction to be put upon the earlier part of the section, the later words which have been quoted indicate so strongly the intention to include (to use the very words themselves) "all private ways," that we cannot read them in any other sense, especially when the à priori reason of the thing is consistent with the sense.

We are of opinion, therefore, that the rights of way in dispute would have been extinguished, apart from any consideration of the fact that the plaintiffs derive their title through Hardcastle.

Does, then, that fact alter the position of matters? We think not. It is said that Hardcastle granted those rights of way by the conveyance of the 29th of September, 1869, and that neither he nor those who claim under him can derogate from his grant. But in the first place it is to be observed that at the date of the conveyance Hardcastle was not the owner of the servient tenement, and could not therefore, in a legal sense, grant the easements in question, although he might convey, and did convey his land to the defendant with all such rights of way, as against third persons, as he himself possessed. But even if he had been the

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owner of the soil of the wastes, over which the trackways ran, we can see no reason why he should be precluded from setting in motion the proceedings under the Inclosure Act, with the view of obtaining an allotment of the land freed from all rights of way or other rights over it, any more than an owner of the wastes, a stranger to the deed, but who must be presumed by himself or his predecessors to have granted the rights of way, would by reason of his grant be precluded from so doing. The Act itself presupposes mutual rights and obligations which, as between the owners of the soil of the land to be inclosed and the owners of rights in or over the land, might be enforced, and the very object of the Act is to establish a machinery by which those rights and obligations may be extinguished, due regard being had by the valuer in his award to the claims of the persons interested. While, therefore, the fact of a particular person having specially and for good consideration granted a way might afford reason for the valuer not interfering with the way so granted, or for giving due compensation in the shape of another way, or an allotment of land, as the case might be; it could not, in our opinion, have any further effect so far as the Act of Parliament is concerned, and could not legally or equitably be a bar to the grantor's setting in motion proceedings of a quasi judicial character, in which the grantee if he pleased might be represented and might duly protect himself.

But, further, we think that when Mr. Hardcastle, upon the sale to the defendant, reserved the allotments to be made to him, he reserved all the rights which the Inclosure Act in respect of such allotment might give him. Sect. 84 provides for such a case by enacting that "it shall be lawful for any person entitled to any allotment to sell, dispose of, or convey the estate in right of which he may be entitled to such allotment separate from and retaining to himself such allotment or the right thereto." Surely when the right to an allotment is reserved, the person in whose favour the right is reserved must be intended to preserve, with the right, everything which by the Act is included in that right; and if so, the power through the medium of the valuer to extinguish ways, being one of the things included in the right, that power is reserved.

We are of opinion, therefore, that the ways in dispute have been

legally extinguished; that the defendant, in asserting by entry his right to use them, was a trespasser, and that the learned county court judge properly entered the verdict and judgment for the plaintiffs.

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Appeal dismissed.

Solicitors for plaintiffs: *Duffield & Bruty.*
Solicitor for defendant: *Scarlett, for Jones & Scarlett.*

[IN THE COURT OF APPEAL.]

March 1.

BOWYER *v.* STANTIAL AND OTHERS.

Church—Ecclesiastical District—Incumbent—Burial Fees—Cemetery.

A cemetery company were incorporated by a local Act, and by one section it was enacted that "upon the interment of every person within the consecrated part of the said cemetery who shall appear by the books of the company to have been removed for the purpose of interment from" certain parishes including C., "the said company shall pay unto the incumbent for the time being of the church or chapel of the parish, or other ecclesiastical district or division of the parish, from which such person shall be so removed" certain fees. By another section "every such incumbent shall pay to the churchwardens or chapelwardens for the time being of his church or chapel" out of the fees received by him certain amounts, "to be respectively paid and applied by them in the same manner and amongst the same persons (including the incumbents of such churches and chapels) and in the same proportions as the fees on interments, which the said churchwardens and chapelwardens are entitled to receive in their respective parishes, districts, or divisions of parishes, are and ought by law or custom to be paid and applied." The plaintiff was the rector of C., and the defendants were respectively the incumbents of three ecclesiastical districts originally comprised within the limits of C.: none of them were in existence at the time of passing the local Act. For some years previous to the establishment of the cemetery the churchyard of C. was used as a place of interment of persons dying within the parish, and the rector of C. for the time being was entitled to all fees arising or accruing in respect of such interments. The plaintiff, as rector of C., claimed to recover against the defendants respectively the fees for the interment of persons removed from the ecclesiastical districts, of which they respectively were incumbents:—

Held, affirming the judgment of the Exchequer Division, that the defendants were entitled to the fees claimed by the plaintiff.

Vaughan v. *South Metropolitan Cemetery Co.* (1 J. & H. 256; 30 L. J. (Ch.) 265) followed.

SPECIAL CASE stated pursuant to a judge's order on an interpleader issue.

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The Rev. F. W. A. Bowyer was rector of the parish of Clapham, and had been entitled to all dues and fees accruing and appertaining to the rector or incumbent of the parish of Clapham since the 25th of February, 1872. The Rev. Dr. Stantial was the incumbent of the ecclesiastical district of St. John, the Rev. A. C. Price was the incumbent of the ecclesiastical district of St. James, and the Rev. G. Forrester was the incumbent of the ecclesiastical district of St. Paul. The districts of St. John, St. James, and St. Paul were wholly comprised within the limits of the parish of Clapham, as it existed at the time of the passing of 6 & 7 Wm. 4, c. cxxix. (1), which incorporated the South Metropolitan Cemetery Company. The several incumbents of St. James's and St. Paul's had been entitled to all dues and fees accruing or appertaining to the incumbents of those districts respectively since the 25th of February, 1872. The incumbent of St. John's had been entitled to all dues and fees accruing or appertaining to the incumbent of the district since the 13th of January, 1875. In pursuance of the provisions of 6 & 7 Wm. 4, c. cxxix, the South Metropolitan Cemetery Company established and maintained a cemetery at

(1) By 6 & 7 Wm. 4, c. cxxix., s. 18, "upon the interment of every person within the consecrated part of the said cemetery who shall appear by the books of the company to have been removed for the purpose of interment from the parish in which the cemetery shall be situated, or from any parish in the county of Surrey adjoining thereto," or from certain other parishes, "the said company shall pay unto the incumbent for the time being of the church or chapel of the parish or other ecclesiastical district or division of the parish, from which such person shall be so removed, the fees following (that is to say) in case such person shall be interred within any vault, catacomb, or brick grave, the fee of twenty shillings, and in case such person shall be interred in the open ground the fee of seven shillings and sixpence.

Sect. 22: "Every such incumbent shall pay to the churchwardens or chapelwardens for the time being of his church or chapel out of every sum of twenty shillings that he shall receive by virtue of this Act in respect of interments in any vault, catacomb, or brick grave in the said cemetery the sum of twelve shillings, and out of every sum of seven shillings and sixpence in respect of interments in the open ground of the said cemetery the sum of three shillings and sixpence, to be respectively paid and applied by them in the same manner and amongst the same persons (including the incumbents of such churches and chapels) and in the same proportions, as the fees on interments, which the said churchwardens and chapelwardens are entitled to receive in their respective parishes, districts, or divisions of parishes, are and ought by law or custom to be paid and applied."

Norwood in the county of Surrey, and a part thereof was set apart for the interment of the dead according to the rites and usages of the United Church of England and Ireland, and was duly consecrated for that purpose by the bishop of the diocese. The parish of Clapham is a parish in the county of Surrey adjoining the parish in which the cemetery is situated within the meaning of the 18th section of the Act above-mentioned. For some years previous to the establishment of the cemetery, the churchyard of the parish church of Clapham was used as a place of interment of persons dying within the parish, and the rector or incumbent of Clapham for the time being was entitled to all fees arising or accruing in respect of such interments, excepting as hereinafter mentioned. None of the districts of St. John, St. James, or St. Paul were in existence at the date of the passing of the Act.

The chapel or church of St. James was originally set apart from the parish of Clapham by deed dated the 5th day of November, 1829. This deed contained a power to the trustees of the chapel or church therein appointed to sell vaults or pieces of ground lying or being in or under the said chapel or church for private places of interment for a price, not less than would at the time of such sale have been payable to the rector of Clapham for the time being upon similar sales of vaults or pieces of ground in the parochial cemetery. And it was thereby declared that the trustees should stand possessed of the purchase-moneys thereof, upon trust to pay to the rector of Clapham for the time being the sum he would be entitled to receive for the sale or grant of a similar vault or parcel of ground in the parochial cemetery for the time being of the parish of Clapham, to retain the surplus for the discharge of a certain debt upon the church, and to pay over the residue, if any, to the minister thereof for his own absolute use and benefit. The deed further provided that on every funeral which should take place at or within the chapel the rector of the parish church of Clapham, and also the clerk and sexton thereof respectively for the time being, should be entitled to the same dues and fees, as they would respectively have been entitled to, in case such funeral had been performed at or within the parish church or the parochial cemetery thereunto belonging, and the surplus, if any, of the dues or fees, which should be received upon

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every such funeral, should belong to the minister, clerk, or sexton for the time being of the chapel respectively. The deed contained similar provisions in respect of the rights of the rector of Clapham for the time being to dues and fees for every monumental stone or slab or other erection, which should from time to time be erected, set up, or fastened within the chapel. And it was further provided that proper entries of all burials, which should take place at the chapel, should be made by the minister thereof for the time being as well in the parochial register-book as in the register thereinbefore directed to be kept in the vestry-room of the chapel. The chapel of St. Paul was built in pursuance of a private Act of Parliament (53 Geo. 3, c. lxxxvi.), and by s. 18 thereof it was provided that "nothing herein contained shall extend, or be construed to extend, to affect or prejudice the right, title, interest, claim, or demand of the rector of the said parish for the time being of, in, and to any Easter offering, oblations, surplice fees, fees for burials, or vaults, or monuments in the said chapel, or other ecclesiastical rights, dues, benefits, or advantages whatsoever arising within the said parish and belonging to the said rector for the time being; but the same shall continue in such and the same manner, as they would or ought to have done in case this Act had not been passed."

The district of St. John was constituted by Order in Council dated the 2nd of November, 1842, the district of St. James by Order in Council dated the 8th of June, 1854, and the district of St. Paul by Order in Council dated the 30th of April, 1861. By these Orders in Council it was respectively provided that marriages, baptisms, and churchings should be solemnized and performed in the chapel or church of each of the said districts respectively; and that the fees arising therefrom should be received by the minister or incumbent for the time being of the chapel or church. No mention of burial fees was made in the Orders in Council, nor has any burial ground ever been attached to any of the districts. From the time of the creation of the districts to the 25th of February, 1872, all fees for burials payable under the 18th section of 6 & 7 Wm. 4, c. cxxix. in respect of persons removed for the purpose of interment from the several districts before mentioned were paid to the rector of Clapham for the time

being, excepting so far as above mentioned. At the time of passing 6 & 7 Wm. 4, c. cxxix. there were in existence certain ecclesiastical districts or divisions of the parishes referred to in s. 18 of that Act, to which burial grounds were attached, and the incumbents of which were duly entitled to solemnize and perform burials in the district: for instance, the burial fees received in respect of interments in the vaults and churchyard of the district of St. Matthew, Brixton, were paid to the churchwardens for the time being of the said district church, and some fixed part thereof was paid over to the rector for the time being of the parish of St. Mary, Lambeth, out of which the district was formed, and the residue thereof was applied partly in payment of the surplice fees of the incumbent for the time being of the district of St. Matthew and in payment of the fees of the clerk and sexton of the district church. It was agreed that the fees payable under the 18th section of 6 & 7 Wm. 4, c. cxxix., since the 25th of February, 1872, and up to the 31st of December, 1876, in respect of persons removed for the purpose of interment from the districts of St. John, St. James, and St. Paul amounted to 66*l.*, 92*l.* 7*s.* 6*d.*, and 125*l.* 17*s.* 6*d.* respectively.

The question for the opinion of the Court was whether the plaintiff, as the rector of Clapham, was entitled to all, or any, and which of the several sums of 66*l.*, 92*l.* 7*s.* 6*d.*, and 125*l.* 17*s.* 6*d.*, as against the defendants, being the incumbents of the several ecclesiastical districts respectively.

The Exchequer Division gave judgment for the defendants, upon the authority of *Vaughan* v. *South Metropolitan Cemetery Co.* (1)

The plaintiff appealed.

Meadows White, Q.C., and *Kenelm E. Digby*, for the plaintiff.

A. Charles, Q.C., and *Bullen*, for the defendants.

The arguments are sufficiently stated in the judgments. The following cases were cited: *Anonymous* (2); *Topsall* v. *Ferrers* (3); *Burdeaux* v. *Lancaster* (4); *Gilbert* v. *Buzzard* (5); *Spry* v. *Gallop* (6); *Bryant* v. *Foot.* (7)

(1) 1 J. & H. 256; 30 L. J. (Ch.) 265.
(2) 2 Show. 184.
(3) Hob. 175.
(4) 1 Salk. 332.
(5) 3 Phillim. 360.
(6) 16 M. & W. 716.
(7) Law Rep. 3 Q. B. 497.

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BRAMWELL, L.J. In my opinion this judgment must be affirmed. I have felt great hesitation during the argument, but I wish to give the following reasons for the conclusion at which I have arrived.

The Act of the South Metropolitan Cemetery Company was drawn in such a way as to raise doubts whether it applied to future as well as to then existing ecclesiastical districts, and also whether it applied to those ecclesiastical districts which had not, as well as to those which had, graveyards. Upon a review of the statute it does not seem unreasonable to suppose that the legislature intended it to extend to future ecclesiastical districts. It may at first sight appear strange that the incumbent of a new ecclesiastical district should participate in the fees payable under the Act, but the answer seems to be that the incumbent would be entitled to his share under the words of s. 18; if district B. is formed out of parish A., then by force of the words of s. 18 the South Metropolitan Cemetery would have to pay district B. for the loss sustained; and if this provision is reasonable as to existing districts, it will be so for future. Further, I do not think it unreasonable that the statute should apply to future districts without graveyards; why should not the incumbent of a future district have a share in the fees as well as the incumbent of an existing district? In point of fact, neither does any work or service to entitle himself to it, although one of them might; it is not a case of vested interest. I see no greater reason why the one should be paid merely because he has the means of doing the work rather than the other who has not the means of performing it. The legislature may have thought it right to put them upon an equality and to make no difference between their emoluments. By its terms s. 18 applies both to districts to be thereafter created and to districts without graveyards: is its effect cut down by s. 22? It is somewhat difficult to understand the effect of this latter section; it cannot be pushed to its full extent, and I think that it must have been framed under an erroneous notion. The clear words of s. 18 cannot be cut down by the doubtful language of s. 22, and I agree with the counsel for the defendants that we ought not to differ from the decision in *Vaughan* v. *South Metropolitan Cemetery Co.* (1)

(1) 1 J. & H. 256; 30 L. J. (Ch.) 265.

which appears to have remained unimpeached for the space of seventeen years.

BRETT, L.J. The question before us is, whether the fees payable by the cemetery company are by force of their Act due to the rector of Clapham or to the incumbents of the ecclesiastical districts, and it is the same as that which arose in *Vaughan* v. *South Metropolitan Cemetery Co.* (1) Apart from the statute, I think that as between the rector and the incumbents burial fees ought to be paid to the rector and not to the incumbents. But then the words of s. 18 are clear, and work no injustice; the section points to events which might happen after the passing of the Act: a parish might afterwards be divided into districts, some of which might have, and others might not have, graveyards attached to them. The parish in respect of which the fees are to be paid is the parish, from which the body is removed for the purpose of interment; but then s. 18 enjoins in the plainest terms that the fees shall be paid to the incumbents of the ecclesiastical districts or divisions, if these have been formed out of the parish. It has been argued that this construction would work manifest injustice to the rector of Clapham. Where the words of a statute are clear, it is, as it seems to me, no argument against the interpretation of them in their ordinary meaning, that they are productive of injustice; but however that may be, as I have before intimated, I see no injustice in the construction which we propose to adopt.

It has been argued that by the cemetery company's Act the rector of Clapham is deprived of the opportunity of earning burial fees; I agree with the view of the present Lord Hatherley, then Vice-Chancellor Wood, in *Vaughan* v. *South Metropolitan Cemetery Co.* (1), that this argument is not sustainable. A clergyman has to perform duties throughout his parish and at all times of the year; the right to receive a fee for the performance of part of those duties is capable of being supported by custom; but still he is bound to perform them; can it be said to be contrary to natural justice, that when an ecclesiastical district is formed out of a

(1) 1 J. & H. 256; 30 L. J. (Ch.) 265.

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parish, the duties of the rector or vicar over it should be taken away from him and transferred to another person? At all events, when the district is formed, the reason for compensation goes. There is nothing in s. 22, which shews by necessary implication that it was inconsistent with s. 18. I agree with Lord Hatherley that it is unnecessary to confine the operation of the latter section.

COTTON, L.J. I am of opinion that the cemetery company were bound to pay the fees in dispute to the defendants. There is in reality nothing to confine the statutes to existing districts; the legislature had in contemplation the breaking up of large parishes, and I do not think it a fair construction to adopt the view urged on behalf of the plaintiff; we must be guided by the words used. When the words of a statute are of doubtful meaning we may consider what result the legislature probably intended, and may adopt that construction which seems best to support it; but there is no obscurity in s. 18, and the argument cannot prevail that it applies only to existing districts. It has been argued that the legislature intended to compensate the rector of Clapham for the discontinuance of the fees accruing to him from burials in the churchyard of the parish; s. 18 does not state in express terms that the rector was entitled at the passing of the Act to be paid fees for performance of the burial service at the churchyard of the parish, although in point of fact he might be so. The legislature probably had in view the inability of the churchyard to provide for the interment of the parishioners, and although it gave the rector certain fees to be paid by the cemetery company, yet it made a bargain with him that whenever an ecclesiastical district should be formed, the fees due in respect of the burial of persons removed from that district should be paid to the incumbent thereof. I think this the proper construction of the language used by the legislature. Taking this view of the enactment we get rid of the argument as to compensation. I will mention s. 22, which has been relied upon by the plaintiff's counsel; as it is framed, it assumes that churchwardens and chapelwardens were entitled to receive fees; but I do not think it necessary to put a construction

upon it; in any point of view it does not seem applicable to every case; and at all events it does not enable us to say that it applies to the present case, and overrules the clear words of s. 18.

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Judgment affirmed. (1)

Solicitors for plaintiff: *Paterson, Snow, Burney, & Bloxam.*
Solicitors for defendants: *Lovell, Son, & Pitfield.*

[IN THE COURT OF APPEAL.]

June 28.

WILLCOCK *v.* TERRELL.

Practice—Writ of Sequestration—Order by Judge to pay Judgment Debt by Instalments—Pension granted for past Services—County Courts Act (15 & 16 *Vict. c.* 54), *s.* 15—*Rules of the Supreme Court*, 1875, *Order XLVII.—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *s.* 5.

Judgment having been obtained against a county court judge for a large sum, a judge's order, under the Debtors Act, 1869, s. 5, was made for payment of the judgment debt by quarterly instalments of 50*l.* each on days named. Default being made in the payment of some of these instalments, and there being no other means of enforcing obedience to the order, writs of sequestration were issued under Order XLVII. of the Rules of the Supreme Court, 1875.

The debtor having resigned his office, a pension of 1000*l.* per annum was granted to him under 15 & 16 Vict. c. 54, s. 15, charged upon and payable out of the Consolidated Fund:—

Held, affirming the decision of the Exchequer Division, that this pension, being a reward for past services only, was liable to seizure under the writs of sequestration; and the Court, at the instance of the judgment creditor, made an order to restrain the debtor from receiving the quarterly payments, and impowering the sequestrators to receive the same, to the extent of the moneys due and payable under the judge's order.

ON the 26th of April, 1872, the plaintiff recovered a judgment in the Court of Exchequer against the defendant for 1629*l.* 4*s.*

By indenture of the 18th of August, 1872, made between the defendant of the one part and the plaintiff of the other part, the defendant covenanted to pay to the plaintiff on the 31st of July, 1872, the said sum of 1629*l.* 4*s.* and interest at 4*l.* per cent., from the 26th of April, 1872, and assigned to the plaintiff by way of security certain policies of insurance. The deed contained a

(1) See *Cronshaw* v. *Wigan Burial Board*, Law Rep. 8 Q. B. 217.

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covenant that, if the defendant should pay the interest quarterly on the days mentioned, and 100*l.* on the 30th of April, 1874, and 100*l.* on every succeeding 31st of July, 31st of October, 31st of January, and 30th of April, until the judgment debt and interest thereon should be paid, and if the policies should be duly kept up, the plaintiff would not, during the life of the defendant, call in or enforce the payment of the 1629*l.* 4*s.* or interest, or any part thereof. The deed also provided that, if and whenever default should be made in the payment of any interest or instalment, or any part thereof, it should be lawful for the plaintiff to enforce payment of the judgment debt by any means he might deem expedient.

The defendant failed to pay the instalments as provided by this deed; and on the 8th of February, 1876, an order was made by Denman, J., on the application of the plaintiff, for payment of 1612*l.* 19*s.* and interest (being the amount then due upon the judgment) by quarterly instalments of 50*l.*, on 10th of April, 10th of July, 10th of October, and 10th of January in each year, beginning on the 10th of April, 1876. The defendant duly paid four instalments of 50*l.* each in pursuance of the order, but failed to pay the fifth, which became due on the 10th of April, 1877.

On the 22nd of May, 1877, an order was made by Denman, J., that the defendant, for default in payment of the fifth instalment of 50*l.*, be committed to prison for six weeks from the date of his arrest, or until he should pay that sum, with 24*l.* 8*s.* the costs of the order, and sheriff's fees for the execution thereof. This order was lodged with the sheriff of Breconshire, who was unable to execute it, the defendant, when not on circuit and in the actual discharge of his public duties as a county court judge and thus privileged from arrest, keeping out of the way to avoid being arrested, and having (as it was believed) now left the country. No payment had been made in obedience of the order. In December, 1877, the defendant applied to the Lord Chancellor and obtained leave to resign his office, and, pursuant to s. 15 of 15 & 16 Vict. c. 54, a pension of 1000*l.* was granted to him as from the 1st of January, 1878, payable quarterly out of the Consolidated Fund.

On the 15th of December, 1877, a writ of sequestration was

issued, whereby, after reciting the order of the 8th of February, 1876, the sequestrators therein named, or any three or two of them, were commanded "to collect, take, and get into their hands, not only the rents and profits of the real estate of the defendant, but also his goods, chattels, and personal estate, and to detain and keep the same until the defendant should pay to the plaintiff three several sums of 50*l.*, making together the sum of 150*l.*, respectively ordered to be paid on the 10th of April, 10th of July, and 10th of October, 1877, and clear his contempt."

On the 17th of December, 1877, notice of the sequestration was given to the lords of the Treasury, and they were requested to direct a portion of the defendant's pension to be paid over to the sequestrators. This they declined to do: but, upon a second application, in which they were referred to the case of *Dent* v. *Dent* (1), they intimated to the plaintiff's solicitors that no payment would be made to the defendant in respect of his pension, until the sequestrators should have had an opportunity to make an application to the Court upon the subject.

A further instalment of 50*l.* under the order of the 8th of February, 1876, became due on the 10th of January, 1878, and on the 12th another writ of sequestration was issued, notice of which was also given to the Treasury.

April 4. *Lumley Smith*, pursuant to a notice of motion, applied for an order upon "the lords of the Treasury or the paymaster general" to pay over to the sequestrators so much of the accruing pension of the defendant, as would suffice to satisfy the sums of 150*l.* and 50*l.* claimed under the writs of sequestration, with costs. The authorities are clear that, though half-pay is not attachable, a pension like this, for past services, is: see *Knight* v. *Bulkeley* (2); *Dent* v. *Dent* (1); see also 1 Daniell's Ch. Pr. 5th ed. 912–914. And the only mode of attaching it is by sequestration under Orders XLII. and XLVII. of the Rules of Court of 1875.

[LORD COLERIDGE, C.J. You have already got your writs of sequestration. How do you propose to avail yourself of them? It seems idle to call upon the paymaster general; he would not obey our order if we made one; he knows no one but his superiors,

(1) Law Rep. 1 P. & D. 366. (2) 5 Jur. (N.S.) 817.

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the lords of the Treasury. And, if we made an order upon the latter, and they did not feel themselves justified in acting upon it, how could we enforce it?]

The same course might be pursued as was adopted in *M'Carthy* v. *Goold* (1) and *Knight* v. *Bulkeley* (2), viz. by an order restraining the defendant from receiving the accruing payments on account of the pension, and impowering the sequestrators to receive them.

Finlay, for the defendant. It may well be doubted whether a writ of sequestration is the proper way of enforcing an order like this which is made under the Debtors Act, 1869 (3), the object of which is the incarceration of the debtor in the event of disobedience. In *Crispin* v. *Cumano* (4) it was held that the Court had no authority to make an order upon the Bank of England (without their assent) to pay over dividends to sequestrators. And in *Reg.* v. *The Lords of the Treasury* (5) it was held that a mandamus will not lie for a similar purpose. Process of sequestration is process of contempt; it is not one of the modes of obtaining execution pointed out by Order XLII. [Rule 3 of the Orders in Chancery of 1870 (6) was also referred to.]

Cur. adv. vult.

April 11. LORD COLERIDGE, C.J. This is an application that the Court should make an order upon the paymaster general for the sum of 50*l.* out of the quarterly payment of an annuity granted to a county court judge under the provisions of 15 & 16 Vict. c. 54. Now, there may be some difficulties, and I am of opinion that there are great difficulties, in granting the order in the form in which Mr. Smith asks for it. The case to which Mr. Finlay has referred, and to which I will refer in a moment, seems to me in its principle to go the full length for which he contends; and I should hesitate very long indeed—as I intimated on the last occasion—before I committed the Court to a contest in point of right with the Treasury.

(1) 1 Ba. & Be. 387.
(2) 5 Jur. (N.S.) 817.
(3) 32 & 33 Vict. c. 62.
(4) Law Rep. 1 P. & D. 622.
(5) Law Rep. 7 Q. B. 387.
(6) Law Rep. 5 Ch. p. xxxiv.

Now, the circumstances of the case are these:—There is a clear and undisputed debt of 1612*l.* 19*s.* due from a late county court judge to the plaintiff. For that sum a judgment has been obtained against the defendant; but there was a difficulty in the way of the plaintiff obtaining the fruits of that judgment. An order was accordingly obtained from my Brother Denman at chambers, upon production of the judgment and proof that it had not been paid off, that a sum of 50*l.* a quarter should be paid by the county court judge until the judgment should be satisfied. The county court judge having, I will not say, absconded, but it being impossible to find out where he now is, and it being impossible to enforce obedience to the order whilst he held his office, because he was only visible whilst going to or returning from his court, during which time he would be protected, and he having since he resigned his office apparently retired, so to speak, into a desert, nothing could be done to obtain the quarterly payments. Under the advice of the Lord Chancellor, a pension of 1000*l.* per annum under 15 & 16 Vict c. 54 has been granted to the late judge, payable quarterly; and the question is whether those quarterly payments or some portion thereof can be made available to satisfy the order.

Now, it seems to me that this case comes almost directly within the terms of Rule III. of the Orders of the Court of Chancery made in 1870, which by the Judicature Act is an order upon which any judge of the High Court may act; and, if there were any doubt about it, it seems to me that Order XLVII. would put it beyond all question. Rule III. provides in substance that, where any person is by an order made in any suit or motion directed to pay money in a limited time, upon default made a writ of sequestration may be issued. Here is a defendant who has been directed by an order made in a suit or matter to pay a certain sum of money in a limited time, and he has not done so; and the question is whether a writ of sequestration may issue. It seems to me that nothing has been said in the ingenious argument of Mr. Finlay, to which I have listened with great attention, to remove this case from the plain operation of the words of Order XLVII.—"Where any person is by any judgment directed to pay money into court, or to do any other act, in a limited time, and after due

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service of such judgment refuses or neglects to obey the same according to the exigency thereof, the person prosecuting such judgment shall, at the expiration of the time limited for the performance thereof, be entitled, without obtaining any order for that purpose, to issue a writ of sequestration against the estate and effects of such disobedient person. Such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have heretofore been dealt with by the Court of Chancery." Mr. Finlay was reduced to argue that the words "any other act" must be read so as to exclude the payment of money. I am unable to see any ground for that argument. It seems to me that, if this had been anything but a pension, and if the persons to be affected were any other than the lords of the Treasury, there would have been no difficulty in the case. But I think these circumstances do introduce a difficulty, and, as at present advised I fail to see how this Court can make an order upon the paymaster general, who is a mere subordinate officer of the Treasury, to pay to the sequestrators any portion of the pension payable to the defendant as it may from time to time accrue due. In the same way, as in the case which has been referred to of costs incurred at quarter sessions, the order could not be made upon the lords of the Treasury themselves, to pay by the hand of the paymaster general. That would be open to the same objection that was taken, and successfully taken, in the case to which Mr. Finlay has referred. I therefore think that to the order in the form in which it is asked for by Mr. Smith there is an insuperable legal objection, inasmuch as, whatever I may think of the moral duties of the lords of the Treasury, I see no mode of enforcing it. Without, therefore, expressing any opinion upon the letters which have passed or the course which those persons have been advised to take, it is enough to say that we cannot make the order as prayed either against the lords of the Treasury or the paymaster general. But there is an authority, and to my mind a direct authority in the Court of Chancery in Ireland decided by Lord Manners after argument. It is the case of *M'Carthy* v. *Goold* (1), in which Lord

(1) 1 Ba. & Be. 387.

Manners directed an order to issue in the form, in which we suggested to Mr. Smith on the former occasion, that we thought an order might go in this case. There, the object was to get at a pension, which had been granted to Lord Westmeath by means of a sequestration. Lord Manners declined to make an order upon the lords of the Treasury: but he said that a pension granted to an individual for past services did not stand upon the same principles, as it had been held in *Stone* v. *Lidderdale* (1) and other decided cases that half-pay is governed by, inasmuch as the object of half-pay is to keep the recipient in a position in which his services may in future be made available for the benefit of his country; whereas, a pension granted for past services, like any other available income, is attachable for the purpose of satisfying the party's just debts. His lordship said that the pension might be reached by the process of the Court, and that the proper mode of effecting this was by an order restraining the defendant from receiving the pension, and directing service of the sequestration upon the lords of the Treasury; and the case goes on to say that the order as suggested by Lord Manners was accordingly granted.

Now, I do not see that that violates any principles of law; and it enables us to do that which is manifestly just, without committing ourselves to any conflict with any other power or jurisdiction. We are therefore willing to grant the sequestrators in this case an order in the general form suggested. Care must be taken in framing the order, because I apprehend it can only authorize the sequestrators to receive the money as and when the payments accrue; and they will probably have to apply to a judge at chambers from time to time for a fresh order, which no doubt will be granted without difficulty.

LINDLEY, J. I am of the same opinion. With reference to the first question raised by Mr. Finlay as to whether this writ of sequestration was lawfully issued, it appears to me that the writ is perfectly regular and proper. In order to determine that question, we must look at the orders now in force under the Judicature

(1) 2 Anstr. 533.

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Act, 1875, and the material one is Order XLVII., which is as follows:—[His Lordship read it.] It is said that this is not a judgment. That is quite true: but by Order XLII., Rule 20, this order is equivalent to a judgment directing the defendant to pay money at certain specified times, and appears to me to fall clearly within Order XLVII. Then it is urged that, assuming that to be so, the order of my Brother Denman requiring the money to be paid at certain fixed times is not an order, upon which a writ of sequestration can issue. Mr. Finlay says it is an order made for the purpose of sending the defendant to gaol in case of default, and cannot be used for any other purpose. That, however, seems to me to be putting much too narrow a construction (to say the least of it) upon the Debtors Act, 32 & 33 Vict. c. 62. Let us see how it would stand without that Act. I apprehend it would be competent to the Court, irrespectively of that Act, to make an order upon the defendant to pay the whole or a part of the sum specified, and that upon an order so obtained it would be competent to the plaintiff to issue a writ of sequestration. Is the order less effective because it is made under the Debtors Act? It is made in the action and in the matter of the Debtors Act. I think it is a proper case for a sequestration as well as for an attachment. The writ therefore is regular, and ought to be enforced.

Then comes the question what is to be done with it. To ascertain that we must have recourse again to Order XLVII., which regulates the practice in these matters. The order says that "such writ of sequestration shall have the same effect as a writ of sequestration in Chancery has heretofore had, and the proceeds of such sequestration may be dealt with in the same manner as the proceeds of writs of sequestration have hitherto been dealt with by the Court of Chancery." Suppose this was a writ of sequestration issued out of the Court of Chancery, what would be the proper course? As far as my recollection serves me, the writ is in the ordinary form, directing the sequestrators to collect, take, and get into their hands, not only the rents and profits of the real estate of the defendant, but also his goods, chattels, and personal estate, and to detain and keep the same until the defendant should pay

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to the plaintiff the sums ordered to be paid, and clear his contempt. Now, the first question which it is material to consider is, whether a pension can be taken under the writ at all: because, if it cannot, no order can be made upon this application. As to that, after some diversity of opinion, there is authority,—not only the Irish case to which my Lord has referred, but also the more recent case of *Dent* v. *Dent* (1),—to shew that it can.

Then, the pension being a proper subject-matter for sequestration, the only difficulty that remains is that the retiring annuity or pension of the county court judge is to be "paid out of the Consolidated Fund quarterly or otherwise as the commissioners of the Treasury may direct:" 15 & 16 Vict. c. 54, s. 15. I do not propose to make any order upon the paymaster general, or upon the Treasury: it is not the practice to do so; and there is not the slightest reason to suppose that such a step will be necessary. The form of attaching a pension like this appears to be given in *M'Carthy* v. *Goold* (2), and particularly in the case of *Knight* v. *Bulkeley* (3), cited by Mr. Smith. We may restrain the debtor from receiving so much of the pension as is appropriated by my Brother Denman's order to the liquidation of the judgment debt; and the sequestrators should be authorized to apply for and receive from the Treasury 50*l.* per quarter out of the moneys which may be in the hands of the paymaster general applicable to the payment of this pension: and it appears to me that, regard being had to the nature of the fund with which we have to deal, it may be necessary for the plaintiff to obtain a similar order as each quarterly payment becomes due, seeing that until that time the money does not become part of his goods and chattels. This application may be made at chambers. I have sketched out a form of order which I think with a little moulding will meet the requirements of the case. It should be an order restraining the defendant from receiving by himself or through his agents or bankers the moneys payable to him in respect of his pension, to the extent of the arrears now due under the deed; and directing the sequestrators to receive from the Treasury or from the paymaster general the

(1) Law Rep. 1 P. & D. 366. (2) Ba. & Be. 387.
(3) 5 Jur. (N.S.) 817.

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amount so due and in arrear: and let them apply for a fresh order at chambers for the further sums of 50*l.* as they become due. That will in substance be the proper order.

Order absolute. (1)

The defendant appealed.

May 29. *Finlay*, for the defendant.

Lumley Smith and *C. Crompton*, for the plaintiff.

The following authorities were cited in the course of the argument: as to the power to assign a pension: *Davis* v. *Duke of Marlborough* (2); *Ex parte Hawker* (3); *Innes* v. *East India Co.* (4); as to the power to commit a debtor: *Horsnail* v. *Bruce.* (5)

Cur. adv. vult.

June 28. The judgment of the Court (Brett, Cotton, and Thesiger, L.JJ.) was delivered by

COTTON, L.J. This is an appeal from an order made by the Exchequer Division at the instance of the plaintiff in the month of April, 1878. The order restrained the defendant from receiving 200*l.*, part of a pension payable to him, and ordered that the sequestrators should receive that amount out of the pension. The order was made to give effect to a writ of seques-

(1) The rule or order was drawn up as follows:—

It is ordered that the defendant be restrained from receiving, by himself or through his bankers or agents, the moneys payable to him in respect of the pension granted to him pursuant to the statute in that case made and provided on his retirement from the office of a county court judge, to the extent of 150*l* and 50*l.*, making together 200*l.*; and that the sequestrators mentioned in the writs of sequestration mentioned herein, viz. S. B., of &c., F. J. G., of &c., E. R. C., of &c., and J. C., of &c., or any three or two of them, do receive from the Treasury, or from the paymaster general, the said sums of 150*l.* and 50*l.*, making together 200*l.*, out of the sum now payable to the defendant in respect of his said pension, and on receiving the same do pay the same to the plaintiff.

And it is further ordered that the said sequestrators, in case of further default by the said defendant in paying the instalments of the judgment debt herein pursuant to the order of the Hon. Mr. Justice Denman made herein, dated the 8th of February, 1876, may be at liberty to apply at chambers for similar orders to the present order, having relation to future sums which may from time to time become payable to the defendant in respect of his said pension.

(2) 1 Swanst. 74.

(3) Law Rep. 7 Ch. 214.

(4) 17 C. B. 351; 25 L. J. (C.P.) 154.

(5) Law Rep. 8 C. P. 378; see *Evans* v. *Wills*, 1 C. P. D. 229.

tration obtained by the plaintiff to enforce an order against the defendant obtained by him. The facts are simple. The plaintiff, before the year 1876, obtained a judgment against the defendant for a sum exceeding 1600*l.* He was unable to obtain payment, and on the 8th of February, 1876, he, under s. 5 of the Debtors Act, 1869, obtained an order, that the defendant (who was at the time a county court judge in receipt of a salary), should pay "the debt by instalments" at times in the order mentioned. The instalments in each year amounted to 200*l.* Subsequently, in December, 1877, the defendant resigned his office of county court judge, and a pension was granted to him under the provisions of the Act 15 & 16 Vict. c. 52, s. 15. The defendant made default in payment of the sums, which the order of 1876 directed him to pay, and the plaintiff issued a writ of sequestration, and afterwards obtained the order of the 11th of April, 1878.

At the time of the passing of the Judicature Act, one of the modes of enforcing orders of the Court of Chancery was by sequestration, and the General Orders made in pursuance of the Judicature Act enable orders made by any judge of the High Court to be enforced in like manner: See Order XLII. Rule 1, and Order XLVII.

It was suggested that an order for payment to a person named on a given day was not an order directing the defendant "to do any other act" within the meaning of Order XLVII.; but this in our opinion cannot be maintained. It was also contended on behalf of the defendant that the order of February, 1876, was made under the 5th section of the Debtors Act, 1869; that the subdivision of that section, under which the order was made, authorized orders for payment by instalments to be made "for the purposes of that section;" that the object of the section was to authorize a judge to commit to prison any person for making default in payment of any sum which in the opinion of the judge he was able to pay, and that it would therefore be wrong to take advantage of the order made under the section in order to give the plaintiff a means of enforcing payment which was not available for enforcing his judgment, and was not contemplated by the 5th section of the Act of 1869. In our opinion this objection

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cannot prevail. The order of February, 1876, was properly made in its present form, and although the primary object was to enable the Court or a judge to commit the defendant if he did not pay the instalments, and at the time when the Act of 1869 passed, orders made by a judge of the Common Law Courts could not be enforced by sequestration, yet as the Judicature Act has enabled orders made by any judge of the High Court to be enforced by this mode, we see no reason why the plaintiff should not avail himself of the additional mode of enforcing the order, even though it was made under an Act passed at a time when only orders made by the judges of the Court of Chancery could be enforced by sequestration.

It was urged on behalf of the defendant, that the order of April, 1878, ought not to have been made, because this Court could not enforce it, by which was meant, could not compel the paymaster general to pay to the sequestrators. It cannot. But the Court can prevent the defendant from receiving, and authorize the sequestrators to receive the sum mentioned. The order is in a form, which is usual in cases where a receiver or other officer of the court is authorized to receive a sum due from any one not before the Court.

The only remaining objection to the order raised by the appellant was that the pension granted to the defendant could not be assigned or otherwise made available for payment of his debts. Where a pension is granted by the Crown to one, who though not for the time engaged in any active duties is still liable to be called to active service, and is therefore to be considered in the service of the Crown, as the half-pay of an officer, the pension is to be considered as to some extent granted in order to maintain the grantee, until he is called on to serve again. But, as stated by Parke, B., in *Wells* v. *Foster* (1): "A man may assign a pension given to him entirely as a compensation for past services, whether granted to him for life or during pleasure." The 15th section of the Act of 15 & 16 Vict. c. 54, under which the pension was granted, says nothing as to the defendant being called on hereafter to perform any duties. In our opinion, the pension may be considered as

(1) 8 M. & W. 149, at p. 152.

granted entirely for past services, and can be made available for payment of the defendant's debt to the plaintiff.

In our opinion, the appeal entirely fails, and must be dismissed with costs.

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Appeal dismissed.

Solicitors for plaintiff: *Bolton, Robbins, & Busk, for Howell & Morgan, Machynlleth.*

Solicitors for defendant: *Elmslie, Forsyth, & Sedgwick.*

[IN THE COURT OF APPEAL.]

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Dec. 6.

EADE AND ANOTHER *v.* JACOBS.

Practice—Interrogatories as to Conversations with deceased Person and as to Matters of Evidence.

The plaintiffs sued as administrators to recover possession of certain hereditaments for breach of a covenant contained in a lease; the defendant alleged that the intestate verbally consented to the breach of the covenant:—

Held, that the plaintiffs were entitled to interrogate the defendant as to when the consent was given and as to the conversation which took place, but that they were not entitled to interrogate him as to the persons in whose presence the verbal consent was given.

THE plaintiffs, as administrators of Isaac Eade, sought to recover possession of certain hereditaments whereof the defendant was lessee, and alleged that they were entitled to enter for breach of the covenants contained in the lease; one of the breaches relied upon was that the defendant had during the term made certain alterations in, and additions to, the demised hereditaments without the consent in writing of the intestate or of the plaintiffs as his administrators. The defendant pleaded that the alterations and additions were made with the consent and authority of the intestate, and that he was aware that they were being made and did not object thereto, but acquiesced in and approved of the same and waived all right of forfeiture. The plaintiffs thereupon administered the following interrogatories:—

1. "At what date or dates were the alterations and additions referred to in the 4th paragraph of the defence made? Give the

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name and address of the builder or builders, or other person or persons by whom they were wholly or partially executed.

2. "When did the said Isaac Eade consent to or authorize the alterations and additions mentioned in the said 4th paragraph other than the alterations to which he consented in writing? Was the consent or authority given on more than one occasion? If so, state the times of each. Also state when and in whose presence such consent and authority, or consents and authorities, were given. State fully the conversation or conversations when such licence or consent, licences or consents, were given by the said Isaac Eade."

Hawkins, J., at chambers, ordered that the latter part of the second interrogatory should be struck out, which asked when and in whose presence the alleged consent was given, and demanded a full statement of the conversations.

The plaintiffs appealed to the Exchequer Division, where Cleasby, B., was of opinion that the order of Hawkins, J., should be affirmed, and Kelly, C.B., considered that the second interrogatory, as originally drawn, ought to be allowed.

The plaintiffs appealed to this Court.

Anderson (*A. T. Lawrence*, with him), for the plaintiffs. It is necessary that the plaintiffs should know when and in whose presence the alleged consent by the intestate was given, in order that they may have an opportunity of testing the truth of the defence; and if they are not allowed to ask the particulars of the conversations, they may be taken by surprise at the trial. The interrogatories, which the plaintiffs propose to administer, are of a very similar character to those allowed in *Hawkins* v. *Carr* (1) and *Hills* v. *Wates* (2); and since the coming into operation of the Judicature Acts the power to interrogate has been much enlarged.

Lumley Smith, for the defendant. The question is not whether, upon principle, these interrogatories ought to be allowed, but whether the discretion of the judge at chambers ought to be overruled. The cases cited in support of the argument for the plaintiffs are not in point; for the interrogatories allowed in them

(1) Law Rep. 1 Q. B. 89. (2) Law Rep. 9 C. P. 688.

related at least primarily to facts, and not merely to conversations and matters of evidence.

A. T. Lawrence, for the plaintiffs, in reply.

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COTTON, L.J. The Lords Justices have requested me to give judgment. The practice formerly observed at Common Law has now come to an end. Under the Judicature Acts every party to an action has the right to administer interrogatories, but the party served with them may object to such as are scandalous, or irrelevant, or not put bonâ fide, or immaterial. The grounds, upon which an objection may be made, are pointed out in Order XXXI., Rule 5. But the onus of proof lies upon the person who applies to strike them out, and it is the primâ facie right to administer them. The question before us is whether the decision of Mr. Justice Hawkins was right; it has been argued before the Exchequer Division; if that Court had been unanimous, I should have been unwilling to entertain this appeal unless there had been an error in a matter of principle. Now I do not put my decision upon the ground that the plaintiffs are administrators, although it may sometimes happen that an executor or administrator may properly interrogate as to circumstances, which lay within the knowledge of the deceased person whom he represents. It seems to me that the interrogatories have gone too far, and also that the objections have gone too far. Looking at the practice formerly existing in the Court of Chancery, I think that the plaintiff is entitled to a discovery of the facts upon which the defendant relies to establish his case, but not of the evidence which it is proposed to adduce. I think that the words "in whose presence" should be struck out; the defendant is not bound to give the names of the witnesses whom he intends to call at the trial. Then comes the question as to conversations. The old rule of pleading in Chancery was that conversations when relied upon as admissions must be stated in substance and effect; and this was a wholesome rule to be followed, because it prevented the opposite party from being taken by surprise. In the present case I think that only the substance of the conversations need be set forth in the answers to the interrogatories. The word "fully" must be struck out, for the plaintiffs must rest content with a fair statement. I have felt doubt whether

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the conversations fall within the line of defence as set up by the pleadings; but on the whole I think that they do; and if they do, the plaintiffs are entitled to know what they were. I think that on the whole the appeal must be allowed without any costs.

BRAMWELL and BRETT, L.JJ., concurred.

Appeal allowed.

Solicitor for plaintiffs: *Charles Gregory.*
Solicitors for defendant: *Angell & Imbert-Terry.*

Dec. 6.

[IN THE COURT OF APPEAL.]

SMITH *v.* DOBBIN.

Practice—Writ issued out of District Registry—Appearance, Notice of entering—Rules of Supreme Court, Order IV. Rule 3a, Order XII., Rule 6a, Order XIII., Rule 5a.

When a writ is issued out of a district registry and is served without the district, it is imperative that notice of appearance be sent to the address for service within the district; notice of appearance given at the address for service in London is insufficient.

THE writ of summons was issued out of the Hereford District Registry, and was indorsed "issued by Thomas Garrald of Hereford, whose address for service is Thomas Garrald, at Thomas White & Sons," London. The defendant appeared in London, and gave notice of appearance to T. Garrald at the office of Thomas White & Sons; the letter containing the notice lay at their office without being opened. The plaintiff, not having received notice of appearance within the time limited by Order XIII., Rule 5a, signed judgment. A master at chambers having ordered the judgment to be set aside for irregularity, Lopes, J., affirmed the order. The Exchequer Division having reversed the decisions of the master and Lopes, J., the defendant appealed.

Petheram, for the defendant, in support of the appeal. The defendant has done all that was required by Rules of the Supreme

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Court, 1875, Order XII., Rule 6a (1). He sent notice of appearance to the address, and this was a sufficient intimation of his intention to defend the action. In any point of view the omission to send notice to Hereford was a mere irregularity, and appearance having been entered the judgment ought to be set aside. The mode of indorsement is misleading, for it induced the defendant to believe that notice of appearance was to be given in London.

A. T. Lawrence, for the plaintiff, was not called upon.

BRAMWELL, L.J. This appeal must be dismissed. It is plain that the defendant has no merits, and the plaintiff is proceeding regularly. It seems to me that the writ was correctly indorsed, and it is not disputed that if he lived within the limits of the district registry the indorsement would be sufficient. The plaintiff has added an address for service out of the district for the benefit of the defendant, who does not reside within it; but the rules require imperatively that notice of appearance shall be given at the address for service within the district. This the defendant has omitted to do and therefore he is in default. It has been contended that the judgment ought ~~not~~ to be set aside

(1) By the Rules of the Supreme Court, 1875, Order IV., Rule 3a: "In all cases where a writ of summons is issued out of a district registry, the solicitor shall give on the writ the address of the plaintiff, and his own name or firm and his place of business, which shall, if his place of business be within the district of the registry, be an address for service, and if such place be not within the district, he shall add an address for service within the district, and where the defendant does not reside within the district, he shall add a further address for service, which shall not be more than three miles from Temple Bar."

Order XII., Rule 6a: "A defendant, who appears elsewhere than where the writ is issued, shall on the same day give notice of his appearance to the plaintiff's solicitor, or to the plaintiff himself if he sues in person, either by notice in writing served in the ordinary way at the address for service within the district of the district registry, or by prepaid letter directed to such address, and posted on that day in due course of post."

Order XIII., Rule 5a: "Where a defendant fails to appear to a writ of summons, issued out of a district registry, and the defendant had the option of entering an appearance either in the district registry or in the London office, judgment for want of appearance shall not be entered by the plaintiff until after such time as a letter posted in London on the previous evening, in due time for delivery to him on the following morning, ought in due course of post to have reached him."

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because appearance has been entered; but how could the plaintiff avail himself of the irregularity except by signing judgment? And I think that the appearance is ineffectual, if the notice of appearance is ineffectual. The judgment was regular and must stand.

BRETT, L.J. The objection to the indorsement is hypercritical. The town where the solicitor for the plaintiff carried on his business is Hereford, and that is his address for service within Order IV., Rule 3a. But as the defendant does not reside within the district, an address for service in London is added. The defendant has only performed part of what is required of him: he has entered an appearance; but he has not sent notice thereof to the plaintiff's solicitor "at the address for service within the district of the district registry," as is pointed out by Order XII., Rule 6a; the plaintiff therefore was entitled to sign judgment after the expiration of the time mentioned in Order XIII., Rule 5a. The defendant was wrong, and the plaintiff was right. The judgment cannot be set aside without an affidavit of merits and payment of costs.

COTTON, L.J. I cannot doubt that the solicitor for the plaintiff has rightly described in the indorsement the address for service within the limits of the district registry. As the defendant omitted to give notice at the proper address, the plaintiff was entitled to sign judgment; and the proceeding being regular, they cannot be set aside without an affidavit of merits.

Appeal dismissed.

Solicitors for plaintiff: *Thomas White & Sons, agents for T. W. Garrald, Hereford.*

Solicitors for defendant: *Courtenay & Croome, agents for William Hebb, Ross.*

[IN THE COURT OF APPEAL.]

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Feb. 23.

SWAINSON *v.* THE NORTH-EASTERN RAILWAY COMPANY.

Master and Servant—Liability of Master to Servant for Injury caused by Negligence of Fellow Servant—Common Employment.

At L. were two stations, one belonging to the G. railway company, and the other to the defendants. These abutted one upon another, and were approached by parallel lines of rails; the entrance and exit from the stations were governed by signals and points worked by signalmen, whose duty was common to both stations. S. was one of these signalmen: he was engaged and paid by the G. railway company, and wore their uniform; but his duty was to attend to the defendants' trains as well as to those of the G. railway company. An engine of the defendants' was upon the lines of the G. railway company, and S. signalled to the driver to go on to the defendants' lines; the driver obeyed, and having reversed the engine, negligently ran over and killed S., who was then looking at a train coming in another direction:—

Held, reversing the judgment of the Exchequer Division, that S. and the driver of the engine were not engaged in a common employment, and that the defendants were liable to compensate the widow of S. for his death.

THE plaintiff sued to recover damages for the death of her husband, who was killed by the negligence of the driver of one of the defendants' engines.

The facts of the case and course of the trial are fully detailed in the judgment delivered by Pollock, B., and hereinafter set forth.

May 12, 1877. *Waddy, Q.C.*, for the plaintiff.
C. Russell, Q.C., and *C. Crompton*, for the defendants.

Cur. adv. vult.

June 1. The judgment of the Court (Pollock and Huddleston, BB.) was delivered by

POLLOCK, B. This action was brought by the plaintiff, who was the widow of Thomas Swainson, against the North-Eastern Railway Company to recover damages for the death of her husband, who was killed by the negligence of an engine driver in the service of the defendants. The trial took place before my Brother Quain at the Middlesex Trinity Sittings, 1876, when the following facts were proved.

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Adjoining Wellington Street, Leeds, are two railway stations, the one belonging to the Great Northern Railway Company, and the other to the North Eastern Railway Company. These abut upon each other and are approached from the south by lines of rails, two of which belong to each of these companies, the entrance to or exit from the station being governed by signals and points, which are worked by signalmen, whose duty is common to both stations.

The deceased man Swainson was one of these signalmen, and he had acted for four years in the same position. He was engaged and paid by the Great Northern Railway Company, and wore their uniform, and was not made aware at the time of his appointment that he was a joint servant, but in fact his duty was to attend to the North-Eastern trains as well as the Great Northern as to points and signals, when any engines or trucks had to be transferred from the rails of one company to those of the other; as between the two companies Swainson was one of what was called the "joint station staff," all of whom were engaged and paid by the Great Northern Railway Company, the cost of their salaries was treated as a joint charge and borne equally by the two companies, and when Swainson received his wages at the end of each week, he signed a pay sheet, which was headed, "Great Northern Railway Traffic Department Pay Bill," "Joint Station Staff."

On the 7th of May, 1875, Swainson in the discharge of his duty was standing on the six-foot space between the Great Northern arrival and the North-Eastern departure lines. A North-Eastern engine came towards the station on the Great Northern arrival rails with some Great Northern coal trucks, and Swainson signalled to the driver to go on to the North Eastern departure line. The driver obeyed and went on to that line until he passed some points, when he reversed his engine and backed out again, having a van before the engine, which obscured his view of the line. Swainson was then looking in the other direction watching a train coming from the south, and failing to observe the engine and van coming out he was struck by the step of the van, knocked down and killed.

Evidence was given on the part of the plaintiff that the engine-driver had not turned on his whistle when he backed out, and also that it was unsafe to back out with the van before the engine.

At the close of the case my Brother Quain left two questions to the jury; 1st, was there negligence on the part of the driver of the defendants' engine; and 2nd, was there contributory negligence on the part of the deceased man, Swainson?

The jury answered the first of these questions in the affirmative and the second in the negative. We see no grounds for disturbing this verdict as being against the weight of evidence upon either question. The counsel for the defendants raised, however, a further point, viz., that the driver of the engine and Swainson were engaged in a common employment, and that the risk which resulted in his death was incidental to that employment, the consequences of which he had undertaken. The learned Judge ruled against the defendants upon this point, but reserved leave to move, the Court having power to draw inferences of fact.

The case was fully and ably argued before us, and upon the facts and finding of the jury it is clear that an action would well lie against the driver of the engine, by whose negligent act the death of Swainson was occasioned. Whether the relation of Swainson to the defendants was such that this action can be maintained against the defendants, is a question the solution of which is more difficult, and requires a careful consideration both of the facts proved and of the law properly applicable to them.

It will be well in the first place to see what is the principle affecting this case, which can be gathered from authority. Up to a certain point this is clear: wherever the person injured and he, by whose negligent act the injury is occasioned, are engaged in a common employment in the service of the same master, no action will lie against the master if he be innocent of any personal negligence. The negligence of a fellow servant is taken to be one of the risks, which a servant as between himself and his master undertakes, when he enters into the service. This is thoroughly established by the cases of *Priestley* v. *Fowler* (1), *Hutchinson* v. *The York, Newcastle, & Berwick Ry. Co.* (2), and other cases.

In *Wiggett* v. *Fox* (3) the rule was held to apply where Wiggett, the person injured, was the servant of Moss, a piece worker, and he by whose negligence the injury was occasioned was in the

(1) 3 M. & W. 1. (2) 5 Ex. 343.

(3) 11 Ex. 832.

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immediate employ of the defendants; but in that case it is to be observed that although Wiggett was engaged by the pieceworker, it was a part of the agreement between the latter and the defendants that the workmen should be paid their weekly wages by the defendants, so that, as was said by Martin, B., in the course of the argument, Moss was not a sub-contractor in the sense that an action would lie against him by a stranger. In *Wilson* v. *Merry* (1) it was held that the master was protected, although the fellow-servant, whose negligence caused the injury, was a manager. So in *Morgan* v. *The Vale of Neath Ry. Co.* (2) and *Lovell* v. *Howell* (3), where the work in which the two servants were engaged was wholly dissimilar.

In all these cases there was not only a common employment, that is, an employment with a common object, but also common service, that is, service under one master. Dicta are to be found, however, in some of the cases, which tend to suggest that the principle ought to be applied to cases, in which the element of common service may be wanting. There is great difficulty in so holding, because when it is said that the servant undertakes the risk of the negligent acts of his fellow servant, the question arises, "undertakes to whom?" and the proposition must, we think, be limited by confining the undertaking to the master of the servant who is supposed to give it, and that it cannot reasonably be extended to strangers, or those who though having some interest in a joint operation are not in some sort the master of the person injured. It is not necessary, in the view which we take of this case, to pursue this further. Before dismissing the cases, however, it is right to notice two, *Voss* v. *Lancashire and Yorkshire Ry. Co.* (4) and *Warburton* v. *Great Western Ry. Co.* (5), which were cited by Mr. Waddy in favour of the plaintiff as governing the present case. In the former of these a man named Voss, a blacksmith in the employ of the East Lancashire Railway Company, was working at one of their engines, which was on their siding at the Liverpool station, when an engine belonging to the defendants and driven by one of their drivers pushed some waggons into the siding, and

(1) Law Rep. 1 Sc. Ap. 326.
(2) Law Rep. 1 Q. B. 149.
(3) 1 C. P. D. 161.
(4) 2 H. & N. 728.
(5) Law Rep. 2 Ex. 30.

so Voss was killed. The station was in the joint occupation of the defendants and the East Lancashire, but the deceased was the servant of the latter company and not of the defendants, and upon this ground the Court held that the defendants were liable. In *Warburton* v. *Great Western Ry. Co* (1) the facts as stated in the judgment of the Court were as follows:—The plaintiff was a servant in the employ of the London and North Western Railway Company, and was at work in the Victoria station in Manchester, when an engine driver in the employ of the defendants, the Great Western Railway Company, having entered the station, shunted a train belonging to the defendants from one part of the station to another, and in so doing was guilty of the negligence complained of. The station was the property of the London and North Western Railway Company, and was used in common by the plaintiff's employers and the defendants and other companies. By an arrangement between these companies, the defendants' engine-driver ought to have awaited a signal from an officer of the London and North Western Railway Company before he shunted the train into the siding; but without doing so, and without any signal at all, he shunted the train and negligently caused the injury in question to the plaintiff. Upon these facts the Court say, "We are of opinion that inasmuch as the injury sustained by the plaintiff was occasioned by the servant of the defendants, not in the course of any common employment or operation under the same master, but by negligence in the discharge of his ordinary duty to the defendants alone, this case is distinguishable from all which have been decided in relation to the above doctrine of exemption, and that therefore this action is maintainable."

In the present case the circumstances material to the legal position of the parties, and the rights flowing therefrom, were very different. The deceased man, Swainson, though engaged by the Great Northern Company, and wearing their uniform, was one of a joint staff, and for four years had received his weekly wages as such; he was therefore practically in the service of two companies, who quoad his service and employment were partners. But further than this, as was said by Lord Colonsay in *Wilson* v. *Merry* (2), "we must look to the functions the party discharges, and his

(1) Law Rep. 2 Ex. 30. (2) Law Rep. 1 Sc. Ap. 345.

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position in the organisation of the force employed, and of which he forms a constituent part." Referring, then, to the duties of Swainson and the very acts on which he was engaged at the time of his death, the evidence shews that they were not performed as servant of or for the benefit of one company only, but were essentially necessary for the common business of both, namely, the interchange of the traffic between the two stations.

The case therefore falls within and is governed by the principle that where there is common employment in common service the master is not liable, and our decision must be for the defendants, for whom judgment must be entered.

Judgment for the defendants.

The plaintiff appealed.

1878. Feb. 21, 22. *Benjamin, Q.C.*, and *Willis, Q.C.* (*T. L. Wilkinson* with them), for the plaintiff. The question is, whether the negligence of the driver of the defendants' engine was one of the risks which the deceased had taken upon himself: it is submitted that although he was one of the "joint station staff," he was not in the service of the defendants, and therefore not a fellow-servant with the driver of the defendants' engine.

[BRAMWELL, L.J. In *Rourke* v. *White Moss Colliery Co.* (1) it was held that a master is not liable for the negligence of his general servant, whilst that servant is acting under the orders and control of another person.]

It is plain, from the opinion of Lord Cairns, L.C., in *Wilson* v. *Merry* (2), that the exemption from liability of a master to his servant for the negligence of a fellow-servant depends upon contract: but as the deceased was not in the service of the defendants, no implied contract by him existed that they should not be liable for the negligence of their servants.

C. Russell, Q.C., and *C. Crompton*, for the defendants. The question is, whether the doctrine "respondeat superior" applies. It is too narrow a definition to say that the exemption from liability depends upon a common employment: it is more correct to say that the liability depends upon whether the person doing the injury and the person injured are members of a common

(1) 2 C. P. D. 205. (2) Law Rep. 1 Sc. Ap. 326 at p. 332.

establishment or a common family. No distinction can be drawn between the relations of the two companies as to the use of the station and the relations of the partners. The rule as to exemption has been gradually enlarged from common employment to common service: *Morgan* v. *Vale of Neath Ry. Co.* (1); *Farwell* v. *Boston and Worcester Railroad Corporation* (2). No reason exists why the exemption should not be extended to a case like this.

[BRETT, L.J. *Warburton* v. *Great Western Railway* (3) is against the argument for the defendants.]

The exemption has been held to exist where a servant has negligently injured the servant of a sub-contractor: *Wiggett* v. *Fox* (4); where the injury has been inflicted by a general servant temporarily employed by another master: *Murray* v. *Currie* (5); *Rourke* v. *White Moss Colliery Co.* (6); and also where the negligence of a servant has injured a volunteer: *Degg* v. *Midland Railway Co.* (7) As instances where the head of a common establishment has been held not to be liable for the negligence of one member thereof resulting in injury to another, may be cited *Southcote* v. *Stanley* (8); *Wilson* v. *Merry* (9). No case is to be found exactly like the present. It is unnecessary for the defendants to consider whether the master's liability is limited on the ground of a supposed contract; but in *Degg* v. *Midland Railway Co.* (7) the facts negatived the existence of any contract: the decision is in favour of the present defendants, because it shews that a person acting as servant may be disentitled to compensation, although he has not contracted with the employers of the persons doing the injury that they shall not be liable; it also establishes that if a person voluntarily puts himself in a position of danger with respect to servants, he is not entitled to sue the master in the event of his sustaining injury. If the deceased, although employed by the Great Northern Railway Company, discharged duties which involved acts of service towards the defendants and required him to do acts for their benefit, he

(1) Law Rep. 1 Q. B. 149.
(2) 4 Metcalfe's Amer. Rep. 49.
(3) Law Rep. 2 Ex. 30.
(4) 11 Ex. 832; 25 L. J. (Ex.) 188.
(5) Law Rep. 6 C. P. 24.
(6) 2 C. P. D. 205.
(7) 1 H. & N. 773; 26 L. J. (Ex.) 171.
(8) 1 H. & N. 247; 25 L. J. (Ex.) 339.
(9) Law Rep. 1 Sc. Ap. 326.

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and the driver of the engine were collaborateurs within the meaning of the rule.

Willis, Q.C., replied.

Cur. adv. vult.

Feb. 23. BRAMWELL, L.J. I think that the reasoning of the judgment in the Exchequer Division shews that this appeal must be allowed; and I am inclined to surmise that the facts were misconceived. The principle governing the liability of a master may be stated in the following manner; he is liable for an injury done to a stranger by his servant acting within the scope of the latter's authority, because the stranger has had no hand in the choice of the servant. This seems a sound rule of law; but where a person is injured by the negligence of a fellow-servant, a different rule prevails. This latter rule is not limited to the case of servants; it extends to guests, who cannot sue the master of the house for an injury done by his servants. We must consider what obligations a servant takes upon himself; it is sometimes said that he contracts to take upon himself the risks of his service; but the proposition may also be stated as follows, namely, that he has not stipulated for a right of action against his master if he sustains damage from the negligence of a fellow-servant. The two forms of the proposition seem to me substantially the same; in either case it is necessary to prove that a relation has been established between the person who complains and the master of the person who does the injury; and this, I think, was the view of the law adopted in the Exchequer Division. But I differ from them in the view taken of the facts. The defendants were not in any manner the masters of Swainson; it is true that he was one of the joint station staff; and he was bound to discharge some duties for their benefit; but they could give him orders only by permission of the Great Northern Railway Company. Again, could the defendants have sustained an action against Swainson for incompetence in the discharge of his duties whereby they suffered damage? it is plain that they could not. It may seem strange that if there had been a partnership between the defendants and the Great Northern Railway Company as to the business carried on at the joint station, neither company would

have been liable for the injury done to their servants; and it may be argued that the only difference between a partnership and the mode of conducting the business in the present case is one of form; but the answer is, that in the case of a partnership Swainson would have been entitled to a remedy against the defendants in the event of the non-payment of his wages; and though in point of fact this may not have been a great advantage, yet the principle remains the same. It may be said that in working the signals for the defendants' engine he was a volunteer working for both companies, and was in a common employment with the driver; but I do not think that that contention would be well-founded; it would resemble the case where a carman receiving cotton was injured by the negligence of the servants of the brokers employed in delivering it; and it was held that the brokers were liable (1), for the carman and the servants of the brokers were not under the same control, and were not members of a common establishment; the work was joint, but the employment was different. Moreover, in the present case, Swainson at the moment when the accident happened was no longer engaged in a common employment with the driver of the defendants' engine.

I am of opinion that the judgment must be reversed.

BRETT, L.J. I am of the same opinion. We are not entitled to consider the origin of the rule, which exempts a master from liability when his servant is injured by the negligence of a fellow-servant; but it has been said that the exemption depends upon an implied contract entered into between the master and servant. I think, however, that the plaintiff in the present case is entitled to recover, because at the time of the accident the deceased was not in a common service, nor engaged in a common employment with the driver of the engine, nor engaged in a joint operation. I think that the authorities bear out the proposition laid down in the Exchequer Division that in order to give rise to the exemption there must be a common employment and a common master; it is not necessary that there should be a common service for a definite time or at fixed wages; for the exemption exists in the case of volunteers and of other persons, where plainly there has been no contract for payment; a volunteer puts himself under the

(1) See *Abraham* v. *Reynolds*, 5 H. & N. 143.

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control of another person, and in respect of that other person he is for the time being in the position of a servant. For the defendants it was not denied that this doctrine is well established, but it was contended that the driver of the engine and the deceased were collaborateurs. To a certain extent I should agree with the argument; but the question is, did the deceased adopt such terms of service as placed him under the orders of the defendants? if he did, I think that would be sufficient to exempt them from liability. That Swainson became their servant pursuant to contract could not be maintained: the only circumstance giving colour to such an argument was his signature to certain pay-sheets; but that is clearly insufficient to constitute him the defendants' servant. It was contended that as regards the use of the station the two railway companies were practically partners: I cannot come to the conclusion that they were: therefore no contract existed between Swainson and the North Eastern Railway Company, and he was servant to the Great Northern Company alone. Then did he adopt such terms of service as placed him under the orders of the defendants? If the question had been properly raised, it might have become necessary to consider whether in signalling the defendants' engine to move from the Great Northern rails he did adopt the terms of such a service; but at all events he ceased to be under the orders of the defendants, when he had finished with the operation of signalling; and I doubt whether he was under their orders even whilst he was engaged in that operation. What was the state of affairs when the accident happened? The train had been changed from the Great Northern line on to the North Eastern line; Swainson then had nothing further to do with the North Eastern line: he was acting solely on behalf of the Great Northern Railway Company and was not assuming to act upon behalf of the North Eastern Railway Company. Upon the other hand, the driver of the engine was solely under the control of the defendants. It seems to me that the two men were strangers to one another and not fellow-servants.

COTTON, L.J. I am of opinion that the judgment of the Exchequer Division must be reversed. The driver of the engine was the servant of the North Eastern Railway Company, and the act of a

servant is the act of his employer, therefore the defendants are primâ facie liable; but it is a rule that where one member of an establishment is injured by the negligence of another member of it, the master is not answerable. It is unnecessary to consider how the rule arises; but it is clear that if a person takes upon himself to act as a member of an establishment, he cannot maintain an action against the head of it for an injury occasioned by the negligence of any person belonging to it. A volunteer is in the same position as a servant: *Degg* v. *Midland Ry. Co.* (1) It must be shewn that in some sense the deceased was the servant of the defendants; but he and the driver of the engine were not acting together at the moment of the accident, they were doing nothing whatever in common: for the reasons assigned by Brett, L.J., which I need not go through, I think that the shunting was over, and that the driver of the engine had again become solely the servant of the defendants; he had passed the bit of line which led from the Great Northern Company's rails to those of the defendants, and had nothing more to do with the former company. Then the circumstance of Swainson's signing the pay-sheet did not constitute him the servant of the defendants. It is true that he was a member of the "joint station staff," but the Great Northern Railway Company had no power to pledge the defendants' credit to Swainson, who was under the orders of that company alone; during the shunting operations he might attend to any suggestions which might be made to him on behalf of the defendants, but that did not make him a servant of the defendants. It may be said that the defendants paid him a portion of his wages, and that this created the relation of master and servant between them; but in truth the Great Northern Company paid the whole of his wages, and one-half of them was repaid by the defendants: and upon the facts, I come to the conclusion that all those employed by the Great Northern Railway Company were paid by them alone.

Judgment reversed.

Solicitor for plaintiff: *W. Elgood.*

Solicitors for defendants: *Williamson, Hill, & Co., for Richardson, Gutch, & Co., York.*

(1) 1 H. & N. 773; 26 L. J. (Ex.) 171.

1878
Jan. 24.

[IN THE COURT OF APPEAL.]

LEYMAN *v.* LATIMER AND OTHERS.

Defamation—Conviction for Felony—Effect of Enduring the Punishment— 9 *Geo.* 4, *c.* 32, *s.* 3.

11 QBD 410

In an action by the editor of a newspaper for libel by printing and publishing of him in another newspaper that he was "a convicted felon" and also a "felon editor," the defendants justified, alleging that the plaintiff had been convicted of felony and sentenced to twelve months' hard labour. The plaintiff replied that the conviction had taken place many years previously, that he had endured the punishment and had thereby become in the same situation as if a pardon under the great seal had been granted to him. At the trial the judge held that the alleged libels merely meant that the plaintiff had been convicted of felony, and that this being true the plaintiff could not recover :—

Held, affirming the judgment of the Exchequer Division, that upon demurrers to the justification and to the reply the plaintiff was entitled to judgment, and also that there must be a new trial.

Per Bramwell, L.J., that the words "felon editor" implied that the plaintiff had been guilty of felony, and the justification did not allege that he had actually committed felony; and therefore although the plaintiff might be "a convicted felon," yet the justification being pleaded to the whole cause of action was too wide and formed no defence.

Per Brett and Cotton, L.JJ., that the question as to the meaning of the alleged libels ought to have been submitted to a jury; that by 9 Geo. 4, c. 32, s. 3, a person convicted of felony after enduring the punishment is in law no longer a felon, and that the justification was bad for not alleging that the plaintiff was then enduring the punishment.

APPEALS by the defendants from the decision of Cleasby and Pollock, BB., upon a rule for a new trial and upon cross-demurrers. The facts and pleadings are stated in the report of the proceedings before the Exchequer Division (1), and it is unnecessary to repeat them here.

Cole, Q.C., and *Bullen*, for the defendants, in support of the appeal. The judgment of the Exchequer Division is based chiefly upon the effect of 9 Geo. 4, c. 32, s. 5; but the construction put upon that statute is wrong. It does not place a felon, who has endured his punishment, in the same position as if he had received a pardon on the ground of innocence. The object of the legislature was merely to enable a person convicted of felony to give

(1) Ante, p. 15.

evidence, as is plain from the title of the statute, namely, "An Act for amending the Law of Evidence in certain Cases." It was not intended that by enduring the punishment the effect of the conviction and sentence upon the credit of the felon should be taken away. The words "is a convicted felon" mentioned in the fourth paragraph of the statement of claim simply mean that the plaintiff had been at some time convicted of felony, and it is immaterial that the word "is" is used instead of "was."

[BRETT, L.J. According to that argument for the defendants, if the plaintiff had been pardoned upon the ground of innocence, he would still be liable to be called a "convicted felon." It is to be observed that the preamble of s. 3 of 9 Geo. 4, c. 32, mentions civil rights: this shews that the enactment had other objects besides making a felon a competent witness.]

Cuddington v. *Wilkins* (1) is not in point for the plaintiff as to the effect of the old law, for it was a case of a general pardon; and despite of some expressions of opinion in that case it seems plain from *Sir Henry Fines' Case* (2), that a special pardon does not restore a convicted felon to the position of an innocent man: and a felon, who has endured his punishment, is, under 9 Geo. 4, c. 32, s. 3, at most only in the place of a person specially pardoned. Moreover in *Cuddington* v. *Wilkins* (1) it does not appear that the plaintiff had been convicted. No doubt, as is clear from the dictionaries of Johnson and Webster, the word "felon" strictly means one who has committed felony; but the alleged libels are to be construed in their popular sense, and according to ordinary interpretation "convicted felon" and "felon editor" simply mean one who has been at some time convicted of felony, and this is admitted even by the plaintiff to be true.

Collins, Q.C. (*G. Pitt Lewis* with him), for the plaintiff. It is unnecessary to rely upon the libel of the 24th of April. The plaintiff may take his stand upon that of the 1st of May, and at the trial prove the former as evidence of malice. In their ordinary sense the words would mean that the plaintiff at the time of publication was undergoing punishment for felony, and this is clearly untrue. [He was then stopped.]

(1) Hob. pp. 67, 81. (2) Godbolt, 288.

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BRAMWELL, L.J. In my opinion these appeals must fail. I do not like to base my decision upon a merely technical view of the case before us; but it seems to me that the defendants are technically wrong. I agree with Blackburn, J., who at the trial acted both as judge and jury, that the words "convicted felon" published in the defendants' newspaper of the 20th of April meant that the plaintiff had been previously convicted of felony. I do not think that they meant that he was then undergoing punishment for felony. The words are literally true, for the plaintiff has at some previous time been convicted of felony. I agree with Blackburn, J., that so far the defence has been made out; but at the trial the words "bankrupt and felon editors" published on the 1st of May appear to have been overlooked. The defendants admit that "felon editor" was intended to apply to the plaintiff, and these words must be taken to mean that the plaintiff has been guilty of felony. So far as the facts are before us, all the averments contained in the third paragraph of the reply are true, and the plaintiff is entitled to have all the issues of fact found in his favour, for the allegation as to the effect of enduring the punishment is a mere conclusion of law. The plaintiff has demurred also to the fourth paragraph of the statement of defence, which simply alleges that he has been convicted of felony. He probably intended to urge that it is no answer to the fourth paragraph of the statement of claim, alleging that the defendants published in the present case that he "is a convicted felon;" but however that may be, I think the demurrer valid, because no defence is shewn to the libel of the 1st of May. That charges the plaintiff with being a "felon editor," and in order to sustain it the defendants must shew that the plaintiff has actually committed felony. It is plain from the numerous authorities cited in 2 Taylor on Evidence, pt. 3, ch. iv. par. 1693, p. 1416 (7th ed.), that a conviction for felony is res inter alios acta, and of itself is no evidence in any civil proceeding, that the person convicted has committed a felony. (1) The dictionaries cited during the argument shew that "felon" means one who has committed felony, and therefore the defendants do not prove the truth of the libel of the 1st of May merely by shewing that the plaintiff has been convicted of felony. This is not only the legal

(1) See 2 Phillipps on Evidence, part 2, ch. 1, sec. 1, p. 27, (10th ed.)

view of the question, but it is also the conclusion to be drawn upon considering it as a matter of good sense. A man may be wrongfully convicted, and may afterwards be pardoned upon the ground of his innocence: in a case of this kind it would be untrue to call him a felon. I think that the demurrer to the fourth paragraph of the statement of defence is good. That paragraph is pleaded to the whole cause of action. It is too wide, for it contains no answer to the libel of the 1st of May, and therefore being bad in part it is bad altogether. The plaintiff also replied the conviction, to which the defendant has demurred. I think that this demurrer is bad. The rule is that where there is a demurrer to a reply pleaded to a bad defence, the plaintiff is entitled to judgment upon the whole record, because upon going back to the root of the mischief it is found that the cause of action is unanswered. For these reasons I think that the plaintiff must succeed altogether upon the demurrers, although except for the purpose of estimating the costs it is immaterial whether he ought to succeed upon the pleadings as to the libel of the 24th of April. Therefore we must grant a new trial.

In my point of view the question does not arise as to the effect of 9 Geo. 4, c. 32, s. 3: it may be stated as follows: is a man, who has been convicted of felony, entitled to say that he is no longer a felon merely because he has undergone the punishment for it? I do not wish to express any opinion upon the subject, except to say, that as at present advised, I do not concur in the learned judgment delivered in the Exchequer Division. It is no doubt desirable that a time should come when a person who has been convicted of felony should cease to be called a felon, and it is cruel to rake up what is past; but on the other hand it is part of the punishment for a crime, that the person committing it should suffer opprobrium; and it would be strange to say that a person formerly convicted upon the clearest evidence of felony is no longer a felon. But as the case comes before us, I think that the plaintiff is substantially entitled to succeed upon all the points brought under our consideration.

BRETT, L.J. In my opinion the question as to the construction of 9 Geo. 4, c. 32, s. 3, does present itself for our consideration.

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11 QBD 418

As it seems to me, the case in point of fact has not been tried; the learned judge at the trial assumed that all the facts had been ascertained, and that the statements complained of were defamatory; but he held that the plaintiff could not recover because the defamatory matters were true; this was an erroneous course, for a question of libel is a question of fact, and evidence ought to have been given of the circumstances under which the statements complained of were published. As to the construction of the statement of the 24th of April, I myself am inclined to agree with Lord Justice Bramwell; but a jury might come to a different conclusion. Even as to the statement of the 1st of May, a jury might possibly find that the plaintiff is a felon within its meaning; for it is admitted that he has been at some time convicted of felony, and the defendants may have only intended to convey that, and I suppose and shall assume that the plaintiff was rightfully convicted: nevertheless, this does not decide the appeal, for I am prepared to hold that inasmuch as he has endured his punishment, he is not now in law a "felon:" endurance of the punishment does away with the felony: I say so on the authority of *Cuddington* v. *Wilkins* (1), which was a correct, and, in my opinion, a righteous decision. The judges thought that they ought not to favour idle and injurious words; and I may add that to allow defamatory words to pass unchecked is against public policy. *Cuddington* v. *Wilkins* (1) is supported by *Searle* v. *Williams* (2), and by the great authority of Hawkins' Pleas of the Crown, book 2, ch. 37, s. 48 (title Pardon). It is no doubt right, upon public grounds, to uphold this doctrine, and to my mind by enacting 9 Geo. 4, c. 32, s. 3, the legislature deliberately adopted the view of the judges: it was considered to be proper that a person, who had endured the punishment for a felony, should not be liable to have reflections made upon him. I think that Blackburn, J., was wrong in the course which he took, at all events as to the libel of the 2nd of May, and that upon the facts as they appear before us he ought to have found the issues of fact in favour of the plaintiff on the ground that the defendants intended to describe him as still being a "felon."

I am clearly of opinion that neither demurrer ought to have

(1) Hob. 67, 81.

(2) Hob. 288, at p. 293.

11 QBD 410

been pleaded, because unless every part of a pleading demurred to is bad, a demurrer under the present system leads to a useless expenditure of costs. But as these demurrers are before us, we must give judgment upon them. Upon the face of the pleadings, to which the demurrers relate, the statements complained of must be read in the ordinary sense of the language employed, and not with a meaning which a jury might possibly find to have been intended to be conveyed; and even if the words "convicted felon," and "felon editor," could be construed as alluding to a past time only, they must be taken to imply actual guilt, and the fourth paragraph of the statement of defence would be bad, because it merely alleges that the plaintiff has been convicted, and not that he has been guilty of felony; but in my view the defence fails because the justification does not allege that the plaintiff was, at the time of publishing the libels, undergoing punishment; and the matter is put in a clear light by the reply, which avers that the conviction took place many years ago. Upon the whole record the plaintiff is entitled, and the judgment of the Exchequer Division was right.

I only wish to add that nothing in our judgment has a tendency to limit the power of inquiry into the previous character of a person tendering himself as a witness: questions may then be put from a justifiable motive, and the occasion is proper; but needlessly to rake up the past misfortunes of another person shews a malignant and wicked frame of mind.

COTTON, L.J. I think that the plaintiff is entitled to an order for a new trial. The case was called on before Blackburn, J., who informed the counsel for the plaintiff that if the case were tried he should direct a verdict for the defendants; and the matter for our consideration is whether that direction could have been right. The question of libel or no libel is for the jury. It is possible that the words of the first libel can be construed as importing that the plaintiff was then a felon; but I incline to think that they only mean that at some previous time he has been convicted of felony; but the words of the second libel may, it is clear, mean that he was undergoing punishment for felony; and in any point

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of view the opinion of a jury ought to have been taken. I think, therefore, that the course adopted by Blackburn, J., was wrong.

I agree with Brett, L.J., as to the effect of a pardon for felony after conviction. I think it impossible to say that s. 3 of 9 Geo. 4, c. 32, was intended simply to render a convicted felon competent to give evidence; no doubt the principle object of the statute, in which it occurs, was to allow persons to be called as witnesses, who had been previously disqualified: nevertheless, I think the third section was passed also with a view to ascertain civil rights; and my view seems to be supported by the proviso referring to punishment for a subsequent felony. By the very words of the statute the endurance of the punishment has the same effect as a pardon after conviction; under the previously existing law after conviction and pardon it would not be actionable to say that the person pardoned had been convicted, but it would be actionable to say that he was still a felon: it was, no doubt, thought a matter of public policy a person leading a reputable life should not be reproached with his former misfortune; this doctrine is distinctly laid down in *Cuddington* v. *Wilkins* (1), and no case has been cited before us to the contrary. It follows that in law the plaintiff cannot be stigmatised as a felon. I need hardly say that the statute does not prevent a full inquiry into the past history of any man, whenever it is a matter of duty to form a right estimate of his credibility or character.

I do not wish to add anything to what has been said by Brett, L.J., as to the demurrers. I entirely agree with his view as to the construction of the pleadings, and with the result at which he has arrived. A demurrer is useful only when the whole question between the parties is raised upon it, and, when the dispute can be decided without going into evidence.

Appeals dismissed.

Solicitors for plaintiff: *Coode, Kingdon, & Cotton, for John Daw & Son, Exeter.*

Solicitors for defendants: *Surr, Gribble, & Bunton, for J. W. Wilson, Plymouth.*

(1) Hob. 67 & 81.

[IN THE COURT OF APPEAL.]

1878
June 25.

ETTY *v.* WILSON.

Practice—Court of Appeal, Jurisdiction of—Nonsuit—Rules of the Supreme Court, Order XL. r. 4.

Upon a nonsuit at a trial before a judge and jury an application for a new trial ought to be made to the Divisional Court, and not to the Court of Appeal.

ACTION on an attorney's bill.

At the trial before Denman, J., and a jury the plaintiff called witnesses to support his claim, who were cross-examined by the defendant's counsel. At the close of the plaintiff's case the learned judge ruled that the evidence failed to establish any case, and directed that a nonsuit should be entered. No question was left to the jury. The defendant was prepared with evidence to contest the plaintiff's case.

The plaintiff appealed from the judgment of nonsuit at the trial before the learned judge.

C. Russell, Q.C., and *W. R. Kennedy*, for the defendant, interposed with a preliminary objection. The appeal does not lie to this Court; the application is for a new trial, and therefore ought to have been made to the Divisional Court under Order XXXIX., Rule 1 *a*. Order XL., Rule 4 (1), so far as it applies to the case of a trial before a judge and jury, confers no power on this Court to grant a new trial, it only applies to cases where there has been a finding by the jury and the judgment has been wrongly entered on the finding.

(1) By Order XL., Rule 4, "Where, at and after the trial of an action by the jury, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and enter any other judgment, on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered with reference to the finding of the jury upon the question or questions submitted to them.

"Where, at or after the trial of an action before a judge, the judge has directed that any judgment be entered, any party may, without any leave reserved, apply to set aside such judgment and to enter any other judgment, upon the ground that, upon the findings as entered the judgment so directed is wrong."

"An application under this rule shall be to the Court of Appeal."

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French, for the plaintiff. Assuming that the defendant is content to take the judgment in his favour, the plaintiff's remedy is in this Court. All the evidence is admitted and on the judge's notes, and it is on such facts that the judge decides the case. It is as if the jury had been discharged, and the application then would be rightly made to this Court under the second clause of Order XL., Rule 4.

C. Russell, Q.C., was not heard in reply.

BRAMWELL, L.J. I think that this objection ought to prevail. I can see no difference between this case and one which was decided a few days ago in this Court (1). It cannot be that if the judge directs the jury to find for the defendant, the appeal should be to the Divisional Court, whereas if he directs a nonsuit the plaintiff must come to the Court of Appeal.

BAGGALLAY, L.J., concurred.

THESIGER, L.J. I am of the same opinion; and I will only add that I express no opinion as to the case where the nonsuit is directed on admitted facts entered in the judge's notes. But here that is not the case. The plaintiff was cross-examined, and the defendant was prepared to give evidence. We must follow the rule laid down the other day. (1) Upon a nonsuit, if the facts are admitted, and the judge decides on the admitted facts, there may be two ways in which the appeal may possibly be said to lie to this Court. The proceeding may be regarded either as a discharge of the jury and a finding of the facts by the judge, or a judgment upon facts which, being admitted, are regarded as the findings of a jury.

Appeal dismissed.

Attorney for plaintiff: *H. G. Field, for Etty, Liverpool.*

Attorneys for defendant: *J. & R. Gole, for Evans & Lockett, Liverpool.*

(1) *Yetts* v. *Foster*, 3 C. P. D. 437.

LORD RIVERS *v.* ADAMS.
SAME *v.* ISAACS.
SAME *v.* FERRETT.

1878
Aug. 8.

Common—Profit à prendre—Right to cut Underwood—Custom—Prescription—Lost Grant to Inhabitants of Parish.

A right claimed by the inhabitants of a parish to cut and carry away for use as fuel in their own houses fagots or haskets of the underwood growing upon a common belonging to the lord of the manor is a right to a profit à prendre in the soil of another. Such a right, therefore, cannot exist by custom, prescription, or grant, unless it be a Crown grant which incorporates the inhabitants.

Such a Crown grant will not be presumed from proof of user by inhabitants if the presumption is inconsistent with the past and existing state of things, and there is no trace of such a corporation having existed at any time.

Such a presumption would, moreover, be wholly unreasonable in a case where at the time when the corporation was supposed to be in existence and entitled to the right, the tenants of the manor were exercising inconsistent rights and asserting their entire control over the underwood.

The user must be connected with the right claimed. A prescriptive right to cut underwood in respect of a particular house is not established by proof of user when the only evidence is that the right was exercised in respect of the inhabitants of the parish generally.

Chilton v. *Corporation of London* (7 Ch. D. 735) followed; *Willingale* v. *Maitland* (Law Rep. 3 Eq. 103) discussed.

SPECIAL CASE stated under a judge's order made by consent in August, 1873, in three actions of trespass:—

1. The actions were against three inhabitants of cottages in Tollard Farnham, a parish within the ancient boundary of Cranbourne Chase, in Dorsetshire. Each of the defendants did on several days in March, 1873, and before Lady Day, cut upon and carry away from the woodland (formerly part of Tollard Farnham Common) belonging to the plaintiff as lord of the manor of Tollard Farnham, certain quantities of haskets and furze. All such haskets and furze were used by the defendants respectively for fuel in their own houses, and no part thereof was sold or carried out of the parish of Tollard Farnham. These were the trespasses sued for. The defendants claimed to commit them as of right.

2. The right claimed, as stated by the witnesses called for the defendants, was for all the inhabitants of the parish of Tollard Farnham to cut haskets on the Tollard Farnham Common from

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old Michaelmas Day in each year till old Lady Day in the next year, and to cut furze there all the year round, and to carry away such haskets and furze for use as fuel in their own houses or elsewhere in the parish, but not for sale or use out of the parish.

[The case, which, with the schedules, occupied more than 150 printed folio pages, need not be reproduced here, all that is material to this report being stated in the judgment.]

The questions for the opinion of the Court (who were to be at liberty to draw inferences of fact and to make all necessary amendments in the pleadings) were:—

1. Whether the inhabitants of Tollard Farnham, or any of them, were entitled to any, and what right of cutting furze or underwood on the locus in quo either as part of Tollard Farnham Common or on any other and what grounds; and, if so, then,

2. Whether such right was vested in all the inhabitants of the parish of Tollard Farnham, and, if not, then,

3. Whether such right was vested in all the inhabitant householders in the parish, and, if not, then,

4. Whether such right was confined to the occupiers of ancient messuages within the parish.

5. Whether any, and which, of the defendants were entitled, as such inhabitants, householders or occupiers, to commit the alleged trespasses.

6. Whether any, and which, of the defendants were, on any and other, and what ground, entitled to commit the alleged trespasses.

Judgment to be entered in each case separately, as the Court should direct, with such injunctions and for such sum to be assessed in such manner as the Court should direct.

May 15, 16, 17, 20, 21. *C. Bowen* (*R. S. Wright*, with him), for the plaintiff.

E. Clarke (*McClymont*, with him), for the defendants.

The arguments are sufficiently noticed in the judgment. The following authorities were cited in addition to those referred to in the judgment: *Croughton* v. *Blake* (1); Manwood on Forest Law, p. 80; Watkins on Copyholds, pp. 451, 452; Grant on Corpora-

(1) 12 M. & W. at p. 208.

tions, p. 107: *Blewett* v. *Tregonning* (1); *Warrick* v. *Queen's College* (2); *Grimstead* v. *Marlowe* (3); *Crowder* v. *Oldfield* (4); *Carr* v. *Foster* (5); *Papendick* v. *Bridgwater* (6); *Doidge* v. *Carpenter* (7); *Hall* v. *Nottingham* (8).

Cur. adv. vult.

August 8. The judgment of the Court (Kelly, C.B., Cleasby and Pollock, BB.), was delivered by

KELLY, C.B. The question argued before us in this case has been whether the inhabitants of the parish of Tollard Farnham, in the county of Dorset, have the right to cut and take fagots or baskets of the underwood growing upon a part of the common which has been inclosed by the plaintiff. Some argument was raised before us upon the right of the defendants, in case they failed to establish any right in the inhabitants, to fall back upon a prescriptive right to take the baskets in respect of the cottages occupied by them respectively. This part of the case will be dealt with hereafter.

At present we deal with the question, which was fully argued before us, viz., the right of the inhabitants as inhabitants. The user and the extent of user are stated in the case. It is stated to have been as of right, but (see paragraph 50), the nature of the right in respect of which it was exercised is one of the questions to be decided by us. There cannot, we think, be a doubt upon the evidence that the user was in fact upon the right of inhabitants as stated in paragraph 2 of the case. The defendant in the first action, Adams, says in his evidence (page 150) that the common was free to everybody in the parish. So that as far as the user goes it agrees with the claim set up, and notwithstanding some expressions to be found in the evidence there is no ground for regarding this as a case in which a particular provision has been made by royal grant or otherwise for the poor of the parish.

If such a right could be claimed by custom there is evidence of

(1) 3 A. & E. 554.
(2) Law Rep. 10 Eq. 105; 6 Ch. 716.
(3) 4 T. R. 717.
(4) 1 Salk. 170.
(5) 3 Q. B. 581.
(6) 5 E. & B. 166; 24 L. J. (Q.B.) 289.
(7) 6 M. & S. 47.
(8) 1 Ex. D. 1.

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5 C P D 446
17 Q B D 241

user which, coupled with the evidence of reputation, might raise a question whether the custom did not exist. But the right claimed is a profit à prendre in the soil of another, and the authorities are uniform from *Gateward's Case* (1) to *Chilton* v. *Corporation of London* (2) that such a custom is bad in law: see *Selby* v. *Robinson* (3); and *Constable* v. *Nicholson* (4); where other authorities are given. Many sound reasons are given in the authorities for this conclusion. It is only necessary to advert to some of those given in *Gateward's Case* (1), because they may be applicable to another view of the present case. It was not a case in which the inhabitants of a certain village generally claimed a profit à prendre, but the plea alleged that by custom all persons inhabiting any ancient messuages should, by virtue of their inhabitancy, have a certain right of common. It was adjudged by all the justices that such custom was against law for several reasons; among others, "2. What estate shall he have who is inhabitant in the common when it appears he hath no estate or interest in the house, but a mere habitation and dwelling?" . . . And "3, Such common will be transitory and altogether uncertain, for it will follow the person, and for no certain time or estate, but during his inhabitancy, and such manner of interest the law will not suffer, for custom ought to extend to that which hath certainty and continuance. 4. It will be against the nature and quality of a common, for every common may be suspended or extinguished, but such a common will be so incident to the person that no person certain can extinguish it, but as soon as he who releases, &c., removes, the new inhabitant shall have it."

It might also be added in relation to such a right as is claimed in the present case, viz., to be provided with fuel from the common that mere inhabitancy is capable of an increase almost indefinite, and if the right existed in a body which might be increased to any number, it would necessarily lead to the destruction of the subject-matter of the custom. There cannot therefore be such a custom. And for the same reasons, and for other reasons, there cannot be a prescription, and there could not be a valid grant unto so fluctuating a body and a body so

(1) 6 Rep. 59, b.
(2) 7 Ch. D. 735.
(3) 2 T. R. 758.
(4) 14 C. B. (N.S.) 230; 32 L. J. (C.P.) 240.

incapable of succession in any reasonable sense of the word so as to confer a right upon each succeeding inhabitant.

The judgment in *Constable* v. *Nicholson* (1) is correctly given in the head-note (except in the use by mistake of the word "easement" for "right.") It is as follows:—"The right of the inhabitants of a township to take stones from the land of another person for the purpose of repairing the highway is a profit à prendre, and cannot therefore be claimed by custom; neither can it be claimed by prescription, as inhabitants are incapable by that description of taking such an easement (right) unless under a grant which would incorporate them." The following are the words of Willes, J., in his judgment (2) as regards the prescription or supposed grant after disposing of the question of custom. "The prescriptive right is not claimed for a corporation or persons taking by succession, but only for a fluctuating body of inhabitants. The prescription pleaded is a grant to that body, but not so as to have the effect of incorporating them. It is clear that such a right cannot exist." See also the decision of Jessel, M.R., to the same effect in the current number of the Law Reports—*Chilton* v. *Corporation of London.* (3)

The claim then can only be supported as resting upon a supposed grant by the Crown to the inhabitants of the right in question as such a grant alone would have the effect of incorporating them, and the argument addressed to us was upon the propriety, and indeed necessity, of presuming such a grant from the user set out in the case. But in dealing with this question, we shall have to bear in mind that there is a difference between a corporate body and the persons who for the time being compose it, and that the members for the time, in their own individual right, take nothing by the grant to the corporation.

There was a considerable argument before us upon the effect of a grant by the Crown to the inhabitants of a parish or village. The question seems to have arisen frequently in early times, and there are several decisions in the Year Books on the subject which are to be found in all the Abridgments under the title Corporation. They are given in Rolle's Abridgment and copied

(1) 32 L. J. (C.P.) 240. (2) 32 L. J. (C.P.) at p. 244.
(3) 7 Ch. D. 735.

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17 Ch D 580

into the other Abridgments. The effect of them appears to be that where there is a grant by the Crown to the inhabitants of a particular parish or village, if the grant is made for a specified purpose, it has the effect of incorporating them so as to carry that purpose into effect, but otherwise is inoperative. Thus it is said, F. pl. 2, In ancient time the inhabitants of a village were incorporated when the king granted them to have a guild of merchants (guilda mercatoria). Pl. 4. If the king grant land to the men or inhabitants of D. their heirs and successors rendering rent for anything touching this land, it is a corporation, but not for any other purpose. (And it is said in Dyer, 100, pl. 70, though not as a decision, but as an opinion that if the rent be released the corporation is ipso facto dissolved, because the rent was the cause of the incorporation.) Pl. 5. But if the king grant lands to the men or inhabitants of D. unless they be incorporated before, the grant is void if nothing be reserved for rent. Pl. 6. If the king grant to the men of Islington to be discharged of toll it is a good corporation to this intent, but not to purchase. And the reason is given. (This is matter of discharge.) Pl. 7. If the king grant land to the inhabitants of Islington and their successors, if they were not a corporation before, this is a void grant, for the king is deceived. In other words, the inhabitants of a place cannot be said to have successors capable of taking unless they be a corporation.

The case, therefore, stands thus. We are called upon to say, because there has been user in the inhabitants individually of this right, not that there has been merely a grant to the same persons who exercise the right (which would be the proper inference in ordinary cases, without regard to the probability of its actually taking place, but which would in this case be inoperative), but that there has been a grant in such a form as to make them into a body corporate having perpetual succession. It appears to us that we ought not to make this presumption, not because it is improbable, but because it is inconsistent with the past and existing state of things. We are to presume that a corporation has been formed many hundred years ago, when there is no trace at any time of its having ever existed. If the inhabitants had held meetings in reference to this right, or appointed any officer to

look to the right, or done any act collectively of that description, the case would be different. We should then have the inhabitants acting in a corporate capacity in reference to this right, and from their doing so, and from their existence de facto as a corporation, we might according to the ordinary rule find a legal origin by a grant from the Crown; but to say that a corporation was created, which has never existed, would be carrying the fiction of a grant further than has ever been done, or than is consistent with reason. And the presumption is made wholly unreasonable when we have, as in the present case, while the supposed corporation is existing and entitled to take the haskets, another body actually existing and legally existing, viz., the tenants of the manor, who are exercising inconsistent rights and publicly asserting their entire control over the underwood on the common.

There is also another reason against making this presumption, which was strongly and properly pressed by the learned counsel for the plaintiff, and which is not applicable to any of the cases in which similar presumptions have been made, viz., that we are asked to presume the action of the Crown in favour of a right in the inhabitants, which could not exist as a custom, because it is unreasonable and contrary to law, and that the Crown, because this could not be done otherwise, got over the difficulty several hundred years ago by making them into a corporation. We cannot make this presumption, not because it is improbable, but because it is most unreasonable.

We were much pressed on behalf of the defendants with the case of *Willingale* v. *Maitland* (1), but when that case is examined it has no bearing upon the exact question which is raised in the present case. It was a demurrer to a bill for want of equity. The bill alleged that Queen Elizabeth, being lady of the manor of Loughton, which was within the royal forest of Waltham, had by her royal charter granted to the inhabitants of the parish of Loughton that the labouring or poor people inhabiting the said parish and having families might at certain times of the year cut certain underwood, and that the rightful disposition of the wood so cut should be for their own consumption and for sale for their own relief to other inhabitants of the parish for their consumption.

(1) Law Rep. 3 Eq. 103.

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The bill being demurred to, the facts were admitted as stated, and it was therefore admitted that there was a grant in the very precise terms stated, which it will be contended had the effect of incorporating the inhabitants for the purpose of carrying into effect the specified charitable object. Accordingly Lord Romilly, M.R., says (1): "It should be observed that, though it is true, as stated in Sheppard's Touchstone, that a grant cannot be made beneficially to the inhabitants of the parish as grantees, yet it is certain that a grant may be made by a private individual in the shape of a charity in trust for the poor inhabitants of a parish, and that such a trust is perfectly good." He afterwards adds, "The books are full of cases in which grants of that description have been supported and established, and this Court has carried the trusts into execution." He afterwards refers to the Act of 14 & 15 Vict. c. 43, by which Hainault Forest was disafforested, and in which a certain privilege of widows residing within a certain district was recognised as a ground for compensation, and eventually decides that, "as it stands on the bill, if the whole bill is to be taken as true, there is a case made for relief."

It is to be noticed that nothing whatever was granted to the inhabitants, neither land nor privilege of any sort; the only grant to the inhabitants was that the labouring poor should have the privilege as alleged, and under a grant from the Crown they may become a corporation and ought to act as such for the purpose of performing this charitable trust.

In the present case we are not dealing with a trust to be performed for the benefit of a limited body, but with the right of the inhabitants generally, and the case renders no assistance in considering without a grant to the inhabitants generally what ought to be presumed from user.

The subsequent case of *Chilton* v. *Corporation of London* (2), before the present Master of the Rolls, should be read in connection with the above case.

A passage in the 4th Inst., p. 297, was referred to because it was said that Tollard Farnham was within the Forest of Cranbourne. Coke is treating of the Courts of the Forest, and he says, "And concerning claims" (meaning claims in the Court of the

(1) Law Rep. 3 Eq. at p. 109. (2) 7 Ch. D. 735.

Forest), "it is specially to be observed that by the forest law a grant made of a privilege within the forest to all the inhabitants being freeholders within the forest or such other commonalties not incorporated, is good." The answer given to this was that it has reference to claims made in the court of the forest, the claim being for what is called a privilege which involves more the idea of exemption from the forest law than the acquisition of property; and further, that although we have abundant proof that Cranbourne was a chase; there is no proof that it was ever a forest in the proper sense of the word; and still further, that we are not dealing with privileges under the law of the forest, but with property under the common law. We are therefore engaged in a different court from the court of the forest, upon a different subject, viz., property, and not privilege, and there is an absence of proof of there being a forest, so that the passage in Coke is inapplicable.

It was impossible to pass over these matters which were so fully argued before us, but there is another reason why we cannot be called upon to find a grant from the Crown in the present case. In most cases where a grant is presumed from user in favour of an individual, the proof of user is definite and complete, but in the present case we are called upon to infer a grant not to an individual but to a class, viz., the inhabitants of a parish, and therefore, in order to found it, there must be proof of user not by some inhabitants, but by the class, that is by inhabitants generally. Now, for the purpose of making this out, reference was made to many schedules annexed to the case.

Schedule 9 was the most important, giving a list of all the tenements in the parish, and shewing in a tabular form in respect of which of them user had been proved, how far their title was derived from the lord, and by which of the persons either claiming title to or occupying the tenements there presentments had been made in the manor court restricting the right to take haskets to the tenants of the manor.

We had also in another schedule (5) presentments taken from the court rolls of the manor relating to the right to cut fuel from the year 1748; also extracts from the parish books (schedule 16), one effect of which appeared to be that the poorer inhabitants had

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taken fuel from the common and been assisted by the overseers in getting it home. We had also presentments extracted from the chase rolls of Cranbourne Chase, and the other schedules enumerated in page 15 of the case.

17 Ch D 378

Now, we are dealing with the right to take fuel from the waste of the manor, in which, primâ facie, the tenants of the manor exercised the right as tenants of the manor; the fact that other inhabitants of the parish exercised the right would only prove a right in those other inhabitants as inhabitants, and would not prove the right in the inhabitants generally.

And in this way the case fails. We cannot go into a detailed examination of the schedules to shew what the effect is, but the conclusion which we arrive at is that the statements in the case and the schedules entirely fail to prove the user by the inhabitants generally as inhabitants such as to justify the presumption of a grant by the Crown. We were not asked, and could not be asked, to presume a grant to such of the inhabitants as were not tenants of the manor.

We now go back to the title of the defendants by prescription. As regards the defendant Ferrett, as his house was a new one, this claim clearly could not be sustained. As regards the defendant Isaacs, the same objection really applied, because his house was also a new one, and although it was built near to an old house and upon a small garden belonging to it, the old house remained and was occupied, so that it was not in substitution for, but in addition to, the old house, and thus any prescriptive right acquired by the old house could not apply to this.

As regards the house occupied by the person under whom the remaining defendant Adams justifies the condition of things appears from paragraph 70 of the case. He occupies a house partly new and partly old, and it may be collected from the statement that the old part may originally, along with another old building, have constituted one house, or it may have been originally a separate house, and a question might arise whether a user was sufficiently made out in respect of the present house, so as to make the prescription apply. But an opinion was intimated in the course of the argument that there was no evidence of the exercise of the right to take haskets as belonging to any particular

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house; on the contrary, it was proved that the right was exercised in respect of inhabitancy of houses, whether old or new. We should have felt justified in coming to the conclusion that Harriet Adams (1), as alleged in the 3rd plea, was seised in fee of the house occupied by her, and that it was not comprised in the lease of the 15th of March, 1781, mentioned in paragraph 68 of the case; but we could not have come to the conclusion that the other allegation in the plea was made out, viz., that she and her predecessor in title had exercised the right of taking estovers as to the messuage appertaining. This is a conclusion of fact, and though the actual taking of haskets by the occupiers of the house was proved to the fullest extent (see paragraph 71 of the case), and though the case does not expressly find in what alleged right it was taken, but leaves that to us, yet the evidence which we have now before us leaves no doubt as to this, as we have already stated in describing the other question, and shews that the right was exercised in respect of inhabitancy. The defendant in the action, Charles Adams, says (p. 150), "the common was free to everybody in the parish."

It is only necessary, upon this part of the case, to refer to the case of *Campbell* v. *Wilson* (2) (quoted with approval in *Angus* v. *Dalton* (3)) to shew the necessity of connecting the user with the right claimed. In that case there had been an inclosure award putting an end to all former rights of way, and a certain private right of way was set out. The question which arose was whether, from user for near the twenty years as of right a grant could properly be presumed, and the argument was that the user over the locus in quo was a user under the award and by mistaking the place set out. All the Court expressed their opinion that if it had been shewn that the user was in fact under the award, though adverse and of right, it could not have been made a foundation for presuming a grant. The language of all the judges is to the same effect, but that of Mr. Justice Lawrence is most precise. He says (4): "But it has been said that if the enjoyment were shewn to have originated in mistake, however adverse it may have

(1) The defendant Adams justified in the 3rd plea as the servant, and by command of Harriet Adams.

(2) 3 East, 294.

(3) 3 Q. B. D. at p. 108.

(4) 3 East, at p. 301.

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been, that is against the presumption, and that the learned judge misled the jury in this respect; but no facts appear to warrant this objection, otherwise it might be very material to be considered. For if in exercising the right of way from time to time it had appeared that the party had asserted his right to be grounded on the award, though it were exercised ever so adversely, I do not know how the jury would be warranted in referring it to any other ground than what the party himself insisted on at the time."

It is plain that if we refer the user to any other right than the one in respect of which it was actually exercised, we might be doing the greatest injustice. For the lord might allow the inhabitants of cottages to exercise the right as inhabitants, knowing that it was a right which could not be established in point of law, and which there was no necessity to interrupt; and he might afterwards be bound by his own interruption, because another right was acquired.

For the above reasons we think that all the questions at the end of the case must be answered in the negative, and that there must be judgment for the plaintiff in all the actions. Acting upon the paragraph at the bottom of page 22 of the case, we direct that the plaintiff's costs be assessed equally between the three defendants.

The injunction prayed for by the plaintiff is granted. (1)

Solicitors for plaintiff: *Duncan, Murton, & Co.*
Solicitors for defendants: *Horne & Hunter.*

(1) To restrain the defendants from repeating the trespasses.

The Mode of Citation of the Volumes in the *Three Series* of the LAW REPORTS, commencing January 1, 1876, will be as follows:—

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1 C. P. D. | 1 P. D.

In the Third Series,
1 App. Cas.

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2. —— *Sale of Food and Drugs Act*, 1875 (38 & 39 *Vict. c.* 63), *ss.* 6, 25—*Nature, Substance, and Quality of Article demanded—Exemption of Defendant—Written Warranty.*] On a prosecution under the Sale of Food and Drugs Act, 1875, for selling as lard a substance which was lard adulterated with upwards of 15 per cent. of water, the defendant proved that he sold the substance in the same condition as it was in when he bought it, and that when he purchased it he received an invoice in which it was described as lard;—*Held*, that the invoice was not a written warranty within the 25th section, so as to discharge the defendant. ROOK *v.* HOPLEY - - 209

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CHURCH—*Ecclesiastical District—Incumbent—Burial Fees—Cemetery.*] A cemetery company were incorporated by a local Act, and by one section it was enacted that "upon the interment of every person within the consecrated part of the said cemetery who shall appear by the books of the company to have been removed for the purpose of interment from" certain parishes including C., "the said company shall pay unto the incumbent for the time being of the church or chapel of the parish, or other ecclesiastical district or division of the parish, from which such person shall be so removed" certain fees. By another section "every such incumbent shall pay to the churchwardens or chapelwardens for the time being of his church or chapel" out of the fees received by him certain amounts, "to be respectively paid and applied by them in the same manner and amongst the same persons (including the incumbents of such churches and chapels) and in the same proportions as the fees on interments, which the said churchwardens and chapelwardens are entitled to receive in their respective parishes, districts, or divisions of parishes, are and ought by law and custom to be paid and applied." The plaintiff was the rector of C., and the defendants were respectively the incumbents of three ecclesiastical districts originally comprised within the limits of C.: none of them were in existence at the time of passing the local Act. For some years previous to the establishment of the cemetery the churchyard of C. was used as a place of interment of persons dying within the parish, and the rector of C. for the time being was entitled to all fees arising or accruing in respect of such interments. The plaintiff, as rector of C., claimed to recover against the defendants respectively the fees for the interment of persons removed from the ecclesiastical districts, of which they respectively were incumbents:—*Held*, affirming the judgment of the Exchequer Division, that the defendants were entitled to the fees claimed by the plaintiff. —*Vaughan* v. *South Metropolitan Cemetery Co.* (1 J. & H. 256; 30 L. J. (Ch.) 265) followed. BOWYER *v.* STANTIAL - - - C. A. 315

COAL MINES REGULATION ACT, 1872 (35 & 36 *Vict. c.* 76), *s.* 51—*Liability of Owner for Contravention of General Rule by another Person.*] The Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), s. 51, after providing general rules to be observed in every mine to which the Act applies, enacts that in the event of any contravention of, or non-compliance with, any of the general rules by any person whomsoever being proved, the owner, agent, and manager shall each be guilty of an offence against the Act, unless he proves that he had taken all reasonable means by publishing, and to the best of his power enforcing, the said rules as regulations for the working of the mine to prevent such contravention or non-compliance.—An information was preferred under this section against the part owner of a coal mine, in which one of the general rules regulating the employment of machines had not been complied with. The evidence was that the general rules were put up in various parts of the mine, and that the defendant occasionally visited the mine, but resided at a distance, and took no part in the management, which was under the exclusive control of the certificated manager, who was also part owner. The defendant was not examined as a witness, as he might have been under s. 63, sub-s. 4, but it was admitted that he had not personally taken any means to enforce the rules. The justices found as a fact that the defendant had taken all reasonable means by publishing, and to the best of his power enforcing, the rules as regulations for the working of the mine to prevent such non-compliance, and dismissed the information:—*Held*, that there was evidence from which the justices might properly come to that conclusion. BAKER *v.* CARTER - - 132

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COMMON—*continued.*
the award certain ways over the lands inclosed, did not set out any ways over the allotments sold to C.:—*Held*, that by virtue of s. 68 of 8 & 9 Vict. c. 118, which directs private ways to be set out over allotments and stops up all other private ways, the trackways which prior to the award existed over the land allotted to H. were extinguished. Crush *v.* Turner - - C. A. 303

2. —— *Profit à prendre—Right to cut Underwood—Custom—Prescription—Lost Grant to Inhabitants of Parish.*] A right claimed by the inhabitants of a parish to cut and carry away for use as fuel in their own houses fagots or haskets of the underwood growing upon a common belonging to the lord of the manor is a right to a profit à prendre in the soil of another. Such a right, therefore, cannot exist by custom, prescription, or grant, unless it be a Crown grant which incorporates the inhabitants. — Such a Crown grant will not be presumed from proof of user by inhabitants if the presumption is inconsistent with the past and existing state of things, and there is no trace of such a corporation having existed at any time.—Such a presumption would, moreover, be wholly unreasonable in a case where at the time when the corporation was supposed to be in existence and entitled to the right, the tenants of the manor were exercising inconsistent rights and asserting their entire control over the underwood.—The user must be connected with the right claimed. A prescriptive right to cut underwood in respect of a particular house is not established by proof of user when the only evidence is that the right was exercised in respect of the inhabitants of the parish generally. —*Chilton* v. *Corporation of London* (7 Ch. D. 735) followed; *Willingale* v. *Maitland* (Law Rep. 3 Eq. 103) discussed. Lord Rivers *v.* Adams - 361

COMPANY—*Fraudulent Prospectus—Liability of Directors for Fraudulent Statement of Agent—Principal and Agent.*] A company formed to work a mine was compelled from want of funds to cease working: money was then advanced to them by some of the directors, and amongst them Barnett and Baldwin. Afterwards, at a general meeting of the company, held in order, amongst other things to provide for the existing deficit and for working expenses, the directors were authorized to issue debentures on such terms and for such amounts as they in their discretion might think fit. The directors accordingly authorized the secretary to employ a firm of brokers to place the debentures. The brokers prepared and issued a prospectus, bearing the names of Bell and others as directors, and containing statements as to the condition and prospects of the company, on the faith of which the plaintiff and others purchased debentures. The money thus raised was paid to the company's bankers, and part of it was applied by the directors on behalf of the company to repay the advances made by Barnett and Baldwin. The debentures having become worthless, the plaintiff brought an action for damages against Bell and others in respect of the statements in the prospectus, some of which were alleged to be fraudulent.—The jury found that the prospectus contained statements of fact which were false to the knowledge of the brokers,

COMPANY—*continued.*
and by which the plaintiff was induced to part with his money; that none of the false statements were made by Bell personally or by his authority; that the brokers had authority to issue a prospectus but no authority to include in it statements which were fraudulent; and that Bell derived no benefit from the money raised by the debentures:—*Held*, by Cockburn, C.J., Bramwell and Brett, L.JJ., Cotton, L.J., dissenting, affirming the judgment of the Exchequer Division, that the defendant Bell was not liable.—By Cockburn, C.J., and Brett, L.J., on the ground that though a party as director to the receipt of money, the defendant Bell was not aware of the falsehood of the statements contained in the prospectus, and derived no personal benefit from the receipt of the money.—By Bramwell, L.J., that the defendant Bell had been guilty of no moral fraud, and not being the principal of the brokers could not be held to have impliedly undertaken for the absence of fraud in them in issuing the prospectus.—By Cotton, L.J., that the defendant Bell was liable in an action to the plaintiff, for it was his duty as director to ascertain whether the statements in the prospectus were true or false. Weir *v.* Bell - - - 32; C. A. 238

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See Revenue. 2.

—— (Sched. A.) Police station - - 66
See Revenue. 1.

INCUMBENT—Right to burial fees - 315
See Church.

INHABITED HOUSE—Duty—Police station 66
See Revenue. 1.

—— Duty—Telegraph Company - - 108
See Revenue. 3.

INTERPLEADER—By sheriff, abandonment of claim - - - - 49
See Sheriff. 2.

INTERROGATORIES—As to conversations with deceased persons and as to evidence 335
See Practice. 9.

INVENTOR—First inventor of patent - 203
See Patent.

INVOICE—Not a written warranty under Sale of Food and Drugs Act, 1875 - 209
See Adulteration. 2.

JUDGMENT—Obtained by collusion - 137
See Sunday Profanation.

LANDLORD AND TENANT—Usual covenants—Merger - - - - 73
See Vendor and Purchaser.

LANDS CLAUSES ACT—Surplus land retained by railway company for purposes of railway - - - - 182
See Railway Company. 3.

LIBEL — *Conviction for Felony—Effect of Enduring the Punishment*—9 *Geo.* 4, *c.* 32, *s.* 3.] In an action by the editor of a newspaper for libel by printing and publishing of him in another newspaper that he was "a convicted felon" and also a "felon editor," the defendants justified, alleging that the plaintiff had been convicted of felony and sentenced to twelve months' hard labour. The plaintiff replied that the conviction had taken place many years previously, that he had endured the punishment and had thereby become in the same situation as if a pardon under the great seal had been granted to him. At the trial the judge held that the alleged libels merely meant that the plaintiff had been convicted of felony, and that this being true the plaintiff could not recover:—*Held*, affirming the judgment of the Exchequer Division, that upon demurrers to the justification and to the reply the plaintiff was entitled to judgment, and also that there must be a new trial.—Per Bramwell, L.J., that the words "felon editor" implied that the plaintiff had been guilty of felony, and the justification did not allege that he had actually committed felony; and therefore although the plaintiff might be "a convicted felon," yet the justification being pleaded to the whole cause of action was too wide and formed no defence.—Per Brett and Cotton, L.JJ., that the question as to the meaning of the alleged libels ought to have been submitted to a jury; that by 9 Geo. 4, c. 32, s. 3, a person

LIBEL—*continued.*
convicted of felony after enduring the punishment is in law no longer a felon, and that the justification was bad for not alleging that the plaintiff was then enduring the punishment. Leyman *v.* Latimer - - 15; C. A. 352

LOCAL BOARD—*Words—Construction of New Streets—Bye-law—Power to pull down Work done in Contravention of Bye-laws.*] By the Local Government Act, 1858, s. 34, power is given to every local board to make bye-laws with respect to the level, width, and construction of new streets, the structure of walls of new buildings, the sufficiency of space about buildings, and the drainage of buildings, &c.; and they may further provide for the observance of the same by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets or to construct buildings, as to inspection by the local board, and as to the power to the local board to remove, alter, or pull down any work begun or done in contravention of such bye-laws:—*Held*, affirming the judgment of the Exchequer Division, that the power to make provision as to removing, altering, or pulling down buildings was not confined to bye-laws relating to structure, but might be extended to and incorporated in bye-laws as to notice and deposit of plans. Baker *v.* Mayor, &c., of Portsmouth - - 4; C. A. 157

LOCOMOTIVE—Used on highway - - 95
See Highway.

LOST GRANT—Right of inhabitants of parish to cut underwood - - - 361
See Common. 2.

LUGGAGE—Of passenger by railway—Duty of railway company - - - 153
See Railway. 2.

MANOR—Mine worked by lord without leaving support for highway - - 54
See Mine.

MARKET—*Prescription to prevent Owners of Shops selling in them on Market Days.*] The grant of a market, with the addition of the words "with all liberties and free customs to such a market belonging," does not imply a right in the grantee to prevent persons selling marketable articles on market days within the limits of the franchise.—Such a right may be gained by immemorial enjoyment or prescription.—The plaintiffs claimed to be entitled by prescription to a meat market within a borough, and as incident thereto they claimed the right to prevent butchers from selling meat in their own shops on market days within the limits of the franchise. The evidence was that from the time of living memory down to 1862 butchers who had shops in the borough closed them on market days, and resorted to the market and sold there, paying stallage: that in 1862 two butchers refused to do this, but on actions being brought submitted, and thenceforth paid toll for keeping their shops open on market days, and that the defendant had paid a similar toll for some years before 1875 when he declined to continue the payment:—*Held*, reversing the decision of the Exchequer Division, that the evidence was sufficient to support the claim to

MARKET—*continued.*
prevent the owners of shops from selling in them on market days. Mayor of Penryn *v.* Best [C. A. 292

MASTER AND SERVANT—Liability of owner of colliery for breach of regulations by manager - - - - 132
See Coal Mines Regulation Act.

—— Liability of railway company for negligence of servant employed by another company
See Negligence. [341

MEDICINES—Stamp duty on - - 214
See Statute.

MERGER—Assignment of reversion in part of demised premises - - - 73
See Vendor and Purchaser.

MINE—*Right to support of Surface—Inclosure Act—Reservation to Lord of Manor.*] Commissioners, acting under the powers conferred on them by a local inclosure Act for inclosing certain commons, set out public highways over the land, and directed that they should be maintained by the inhabitants and occupiers of the township in which they were situated, and that it should be lawful for all persons to use the same. The Act reserved to the lord of the manor, his successors and assigns, in the widest terms, all rights belonging to the manor, and all mines, minerals, and quarries under the commons, with power to do every act necessary for the draining, winning, and working such mines, minerals, and quarries as fully and freely as he or they could have had, held, used, or enjoyed the same in case the Act had not been made, without paying any damages or making any satisfaction for so doing. The assignees of the lord of the manor worked the mines so as to injure one of the roads set out by the commissioners. In an action against them by the local board, on whom the duty of repairing the road fell, to recover the expense of doing so:—*Held*, that the reservation to the lord of the manor must be taken to be subject to the public right created by the statute, and did not protect the defendant from liability. Benfieldside Local Board *v.* Consett Iron Company - - 54

MINES AND MINERALS—Deduction for exhausted capital - - - 23
See Revenue. 1.

MORTGAGEE—Of ship—Right to freight 263
See Ship and Shipping. 2.

MUNICIPAL CORPORATION—*Municipal Corporations Act* (5 & 6 *Wm.* 4, *c.* 76), *s.* 126—*Statutes—Interpretation—Penalties*—3 & 4 *Vict.* 97, *s.* 16—*Leges posteriores priores contrarias abrogant.*] Sect. 126 of the Municipal Corporations Act provided that when by any Act any penalties or forfeitures should thereafter be made recoverable in a summary way before any justices of the peace and by such Act the same should be made payable to his Majesty, in every such case the same, if recovered and adjudged before any justices of any borough in which a separate court of quarter sessions of the peace should be holden, should be adjudged to be paid to the treasurer of the borough to the credit of the borough fund.—A subsequent Act, 3 & 4 Vict. c. 97, enacted, by s. 16, that certain offenders might be taken before a justice of the peace and convicted summarily, and should

MUNICIPAL CORPORATION—*continued.*
thereupon forfeit to her Majesty a sum not exceeding 5*l.*—An offender having been convicted under the last-mentioned Act, before justices in a borough having a separate court of quarter sessions, was sentenced to pay a fine:—*Held*, affirming the judgment of the Exchequer Division, that the provisions of the Municipal Corporations Act must be read as incorporated in the subsequent Act, and that the fine was therefore payable to the borough treasurer. THE ATTORNEY GENERAL *v.* MOORE - - - C. A. 276

NEGLIGENCE—*Master and Servant—Liability of Master to Servant for Injury caused by Negligence of Fellow Servant—Common Employment.*] At L. were two stations, one belonging to the G. railway company, and the other to the defendants. These abutted one upon another, and were approached by parallel lines of rails; the entrance and exit from the stations were governed by signals and points worked by signalmen, whose duty was common to both stations. S. was one of these signalmen: he was engaged and paid by the G. railway company, and wore their uniform; but his duty was to attend to the defendants' trains as well as those of the G. railway company. An engine of the defendants' was upon the lines of the G. railway company, and S. signalled to the driver to go on to the defendants' lines; the driver obeyed, and having reversed the engine, negligently ran over and killed S., who was then looking at a train coming in another direction:—*Held*, reversing the judgment of the Exchequer Division, that S. and the driver of the engine were not engaged in a common employment, and that the defendants were liable to compensate the widow of S. for his death. SWAINSON *v.* THE NORTH-EASTERN RAILWAY COMPANY C. A. 341

—— Obstruction of highway - - 268
See NUISANCE.

NON-SUIT—Application for new trial - 359
See PRACTICE.

NOTICE—Appearance to writ—District registry
See PRACTICE. 13. [338

—— Constructive of provisions in under-lease 73
See VENDOR AND PURCHASER.

—— Of intention to erect buildings - 157
See LOCAL BOARD.

—— Of motion—Rule for sheriff to pay money levied - - - - 237
See PRACTICE. 11.

NUISANCE—*Van left on Roadside—Obstruction of Highway — Fright of Horses — Development of Vice thereby — Kicking Horse — Damage to Driver — Proximate cause of.*] A house-van attached to a steam-plough was left for the night on the grassy side of a highway by the defendant. The van and plough were four or five feet from the metalled part of the way. During the evening the plaintiff's testator drove his mare in a cart along the metalled road. The mare was a kicker, but he was unaware of her vice. Passing the van she shied at it, kicked, and galloped kicking for 140 yards, then got her leg over the shaft, fell, and kicked her driver as he rolled out of the cart. He afterwards died from the kick so received.—In an action under

NUISANCE—*continued.*
Lord Campbell's Act (9 & 10 Vict. c. 93, s. 1), by his executors for wrongful and negligent obstruction of the highway, the jury found that the van was left where it stood unreasonably, and negligently, and caused some appreciable danger to vehicles passing along the metalled parts of the road; that the death was occasioned by the van standing where it did, and by the inherent vice of the mare combined, and that there was no contributory negligence:—*Held*, that on these findings the verdict and judgment must be for the plaintiffs; for the unauthorized, unreasonable, and dangerous user of the highway by the defendant was the proximate cause of the injury. HARRIS *v.* MOBBS - - - - - 268

OWNER—Of colliery—Compliance with statutory regulations - - - - 132
See COAL MINES REGULATION ACT.

PAINTING OR PICTURE—Under Carriers Act
See RAILWAY. [121

PATENT — *First and true Inventor — Invention communicated in England by one British Subject to another.*] The communication, made in England by one British subject to another, of an invention does not make the person to whom the communication is made the first and true inventor, within the meaning of the statute 21 Jac. 1, c. 3, so as to enable him to take out letters patent for the invention.—The legal personal representative of a person who has made an invention, but not taken out letters patent for it, cannot take out such letters patent. MARSDEN *v.* THE SAVILLE STREET FOUNDRY - - - C. A. 203

PATTERNS AND DESIGNS—Carriers Act 121
See RAILWAY.

PAYMENT INTO COURT—Claim reduced by 1
See PRACTICE. 8.

—— Pleaded together with denial of cause of action - - - - 251
See PRACTICE. 10.

PENALTIES—Action for—judgment by collusion
See SUNDAY PROFANATION. [137

—— Right of borough treasurer to - - 276
See MUNICIPAL CORPORATION.

PENSION — Of county court judge—Sequestration - - - - - 323
See PRACTICE. 13.

PLEADING—Payment into court and denial of cause of action pleaded together - 251
See PRACTICE. 10.

POLICE STATION—Inhabited house duty 66
See REVENUE. 1.

POOR LAW — *Settlement by Derivation — Poor Law Amendment Act*, 1876 (39 & 40 *Vict. c.* 61), *s.* 35.] The first paragraph of s. 35 of the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), which abolishes derivative settlements, except in the case of a wife from her husband, and of a child under the age of sixteen from its parent, is to be read retrospectively as well as prospectively, both in the enacting part and in the exception.—A pauper born in 1841 had while under the age of sixteen and before the passing of the Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61),

POOR LAW—*continued.*

derived a settlement from his father, who had acquired a settlement by estate, and the pauper never acquired any settlement of his own:—*Held*, that though the enacting part of the first paragraph of s. 35 of that Act would, but for the exception, have destroyed the derivative settlement, the case fell within the exception, and that the pauper therefore retained the derivative settlement after the Act. WESTBURY-ON-SEVERN *v.* BARROW-IN-FURNESS - - - 88

POOR RATE — *Union Assessment — Valuation—* 27 & 28 *Vict. c.* 39, *s.* 4.] The valuation required by s. 4 of the Union Assessment Committee Amendment Act, 1864, is not a field valuation, but one giving the collective value of the hereditaments of each occupier. RAWLENCE *v.* GUARDIANS OF HURSLEY UNION - - - 44

POUNDAGE — Constructive seizure under fieri facias - - - - 174
See SHERIFF. 1.

PRACTICE—*Court of Appeal, Jurisdiction of—Nonsuit—Rules of the Supreme Court, Order XL. r.* 4.] Upon a nonsuit at a trial before a judge and jury an application for a new trial ought to be made to the Divisional Court, and not to the Court of Appeal. ETTY *v.* WILSON C. A. 359

2. —— *Assignment of Chose in Action—Set-off and Counter-claim for Damages against Assignee for Breach of Contract by Assignor—Judicature Act*, 1873, *s.* 25, *sub-s.* 6—*Order XIX., Rule* 3.] The statement of claim alleged that the plaintiff sued as assignee by deed of a debt due from the defendant to the assignor on a building contract. The defendant pleaded, by way of set-off and counter-claim, that he was entitled to damages for breaches of contract by the assignor to complete and deliver the buildings at the specified time whereby the defendant lost the use of them. On demurrer to so much of the defence as alleged breaches of contract by the assignor:—*Held*, that the defendant was not entitled to recover any damages against the plaintiff, but was entitled by way of set-off or deduction from the plaintiff's claim to the damages which he had sustained by the non-performance of the contract by the assignor; and that the form of defence must be amended accordingly. YOUNG *v.* KITCHIN 127

3. —— *Compulsory Reference—Common Law Procedure Act*, 1854, *s.* 3.] In an action for breach of covenant to repair the defendant denied his liability. A judge having ordered the action to be referred compulsorily under the Common Law Procedure Act, 1854, s. 3, the Exchequer Division affirmed the order:—*Held*, that the order must be reversed, for the judge had wrongly exercised his discretion in referring it.—*Semble* (by Cockburn, C.J., Brett and Cotton, L.JJ.), that as there was a preliminary question as to the liability of the defendant to be decided before any question of account could arise, there was no power to refer the action compulsorily under the above enactment. CLOW *v.* HARPER C. A. 198

4. —— *Costs—Counter-claim—County Court Act*, 1867, *s.* 5—*Rules of Court*, 1875, *Order XIX., Rule* 3.] The County Court Act, 1867, s. 5, does not apply to counter-claims, so that where the plaintiff proved a claim for 40*l.*, and the defendant a counter-claim for 10*l.*, the defendant, in the absence of any order as to costs, was held entitled to the costs of proving his counter-claim and of the issues, so far as they related thereto. BLAKE *v.* APPLEYARD - - - 195

5. —— *Counter-claim—Rules of the Supreme Court, Order XXII., Rule* 5—*Words "Question between Defendant and Plaintiff along with any other Person or Persons"—Order XVI., Rule* 3—*Judicature Act*, 1873, *s.* 24, *sub-s.* 3.] A defendant is entitled to add a third person as party to the action if the defendant's counter-claim shews a question arising between himself and the plaintiff along with that third person, and relating to the cause of action sued upon by the plaintiff, even although the third person could not be a party to the plaintiff's original claim.—Claim for damages for preventing the plaintiff from completing certain work pursuant to a contract with the defendants. Defence: that by a clause in the contract the defendants had power to take the work out of the plaintiff's hands if he failed to do it properly; that the plaintiff did so fail, and the defendants took the work out of his hands; and, by way of counter-claim, that owing to the plaintiff's breach of contract the defendants did expend 256*l.* in excess of what it would have cost them if the plaintiff had fulfilled his agreement; and that one R. had, by a general bond, bound himself in the sum of 200*l.* for the proper execution of the work, and they sought to recover 256*l.* from the plaintiff, and 200*l.* under the bond, from R. The defendants having served R. with the defence and counter-claim pursuant to Order XXII., Rule 6, R. moved to strike out the counter-claim:—*Held*, reversing the decision of the Exchequer Division, that the claim for relief by the defendants against R., by way of counter-claim, was a question arising between the defendants and the plaintiff along with R. within the meaning of Order XXII., Rule 5; and the defendants were entitled to add R. as party to the action. TURNER *v.* HEDNESFORD GAS COMPANY - - - C. A. 145

6. —— *County Court—Appeal—Jurisdiction to hear Appeal—Reference of Suit in County Court to Arbitration—Refusal of County Court Judge to set aside Award—County Courts Act*, 1846 (9 & 10 *Vict. c.* 95), *s.* 77—*County Courts Act*, 1850 (13 & 14 *Vict. c.* 61), *s.* 14.] A suit in a county court having been referred by the judge thereof to an arbitrator, under 9 & 10 Vict. c. 95, s. 77, and the arbitrator's award having been entered up as the judgment, an application was made to the judge to set aside the award, on the ground that the arbitrator had exceeded his jurisdiction by taking into consideration matters not referred to him. The judge having refused this application:—*Held*, that the Court of Appeal had no jurisdiction, under 13 & 14 Vict. c. 61, s. 14, to entertain an application on appeal from the judge to set aside the award. MAYER *v.* FARMER - 235

7. —— *Costs to "follow the Event"—Costs of former Trial where new Trial had—Judicature Act*, 1875, *Order LV.*] The event mentioned in Order LV. is the result of all the proceedings incidental to the litigation, and the costs which follow the event include the costs of all the stages of that litigation.—The plaintiff in an action

PRACTICE—*continued.*
recovered a verdict. The Court ordered a new trial, unless the plaintiff should consent to certain terms, but gave no direction as to costs. The plaintiff did not consent, and a new trial was had, when a verdict was entered for the plaintiff:—*Held*, that the plaintiff was entitled to the costs of the first trial, as part of the costs of the action which, under Order LV., follow the event. FIELD *v.* GREAT NORTHERN RAILWAY COMPANY - 261

8. —— *County Court—Claim indorsed on Writ reduced below* 50*l.* *by payment of Money into Court—Jurisdiction to make Order that Action be tried in County Court—*30 *&* 31 *Vict. c.* 142, *s.* 7.] Where a claim indorsed on a writ originally exceeds 50*l.*, and is reduced below that sum by a payment of money into court after action brought, a judge has no jurisdiction, under s. 7 of 30 & 31 Vict. c. 142, to order that the action be tried in a county court.—*Osborne* v. *Homburg* (1 Ex. D. 48) approved. FOSTER *v.* USHERWOOD - C. A. 1

9. —— *Interrogatories as to Conversations with deceased Person and as to Matters of Evidence.*] The plaintiffs sued as administrators to recover possession of certain hereditaments for breach of a covenant contained in a lease; the defendant alleged that the intestate verbally consented to the breach of the covenant:—*Held*, that the plaintiffs were entitled to interrogate the defendant as to when the consent was given and as to the conversation which took place, but that they were not entitled to interrogate him as to the persons in whose presence the verbal consent was given. EADE *v.* JACOBS - - C. A. 335

10. —— *Rules of the Supreme Court, Order XXVII., r.* 1*; Order XXX.—Pleading—Embarrassing Defence—Payment into court and Denial of Plaintiff's Causes of Action pleaded to same part of Statement of Claim.*] As a general rule, a defendant may by his statement of defence deny the plaintiff's causes of action, and at the same time plead payment into court in respect of the whole or any part of them.—*Quære*, whether the general rule above mentioned may under special circumstances include actions brought to try a right of or in respect of property which is denied, or to establish character which has been assailed, and actions where the plaintiff is by the statement of defence charged with fraud.—*Quære*, whether *Spurr* v. *Hall* (2 Q. B. D. 615) was correctly decided. BERDAN *v.* GREENWOOD - C. A. 251

11. —— *Rule or Order to shew cause in any Action—Notice of Motion—Ruling Sheriff to pay Money levied under Fi. Fa.—Judicature Act,* 1873*—Order LIII., rr.* 2, 3, 14.] A rule calling on a sheriff to shew cause why he should not pay to the plaintiff's solicitors the money levied under a fi. fa., is a rule or order to shew cause in an action within the meaning of Order LIII., Rule 2, and the application cannot be heard unless notice of motion has been given to the sheriff under Order LIII., Rules 3 and 4. DELMAR *v.* FREEMANTLE [237

12. —— *Writ issued out of District Registry—Appearance, Notice of entering—Rules of Supreme Court, Order IV., Rule* 3*a, Order XII., Rule* 6*a, Order XIII., Rule* 5*a.*] When a writ is issued out of a district registry and is served without the

PRACTICE—*continued.*
district, it is imperative that notice of appearance be sent to the address for service within the district; notice of appearance given at the address for service in London is insufficient. SMITH *v.* DOBBIN - - - - - C. A. 338

13. —— *Writ of Sequestration—Order by Judge to pay Judgment Debt by Instalments—Pension granted for past Services—County Courts Act* (15 *&* 16 *Vict. c.* 54), *s.* 15*—Rules of the Supreme Court,* 1875*, Order XLVII.—Debtors Act,* 1869 32 *&* 33 *Vict. c.* 62), *s.* 5.] Judgment having been obtained against a county court judge for a large sum, a judge's order, under the Debtors Act, 1869, s. 5, was made for payment of the judgment debt by quarterly instalments of 50*l.* each on days named. Default being made in the payment of some of these instalments, and there being no other means of enforcing obedience to the order, writs of sequestration were issued under Order XLVII. of the Rules of the Supreme Court, 1875.—The debtor having resigned his office, a pension of 1000*l.* per annum was granted to him under 15 & 16 Vict. c. 54, s. 15, charged upon and payable out of the Consolidated Fund:—*Held*, affirming the decision of the Exchequer Division, that this pension, being a reward for past services only, was liable to seizure under the writs of sequestration; and the Court, at the instance of the judgment creditor, made an order to restrain the debtor from receiving the quarterly payments, and empowering the sequestrators to receive the same, to the extent of the moneys due and payable under the judge's order. WILLCOCK *v.* TERRELL - - - - - C. A. 328

—— Appeal court of—Case stated by county court judge - - - - 303
See COMMON. 1.

PRESCRIPTION—Right of inhabitants of parish to cut underwood - - - 361
See COMMON. 2.

—— To prevent shopkeeper selling on market days - - - - - 292
See MARKET.

PRINCIPAL AND AGENT—Liability of directors for fraud of agent - 32; C. A. 238
See COMPANY.

PROFIT A PRENDRE—Right to cut underwood *See* COMMON. 2. [361

PROFITS OR GAINS—Under income tax, schedule D. - - - - - 23
See REVENUE. 2.

PROSPECTUS—Fraudulent—Liability of directors - - - - - 238
See COMPANY.

RAILWAY COMPANY—*Carriers Act* (11 *Geo.* 4 *&* 1 Wm. 4, *c.* 68), *s.* 1*—Painting or Picture—Painted Patterns and Designs.*] The word "paintings" in the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), s. 1, is used in its ordinary and popular sense to denote works of art.—Coloured imitations of rugs and carpets and coloured working designs, each of them valuable and designed by skilled persons and hand painted, but having no value as works of art:—*Held*, not to be paintings within the Carriers Act. WOODWARD *v.* LONDON AND NORTH-WESTERN RAILWAY COMPANY - - 121

RAILWAY COMPANY—*continued.*

2. —— *Carrier—Passenger's Luggage—Delivery to Passenger—Termination of Company's Risk.*] It is the duty of a railway company with regard to the luggage of a passenger, which travels by the same train with him but not under his control, when it has reached its destination, to have it ready for delivery upon the platform at the usual place of delivery until the owner, in the exercise of due diligence, can receive it; and the liability of the company does not cease until a reasonable time has been allowed to the owner to do so. PATSCHEIDER *v.* GREAT WESTERN RAILWAY COMPANY - - 153

3. —— *Superfluous Land—Land not immediately available for the purposes of the Railway, but bonâ fide retained for such purposes—Lands Clauses Consolidation Act*, 1845 (8 & 9 *Vict. c.* 18), *s.* 127.] Land which is taken compulsorily by a railway company for the purposes of their Act, and which is bonâ fide retained by them with a reasonable expectation of using it for such purposes, does not at the expiration of ten years from the time fixed for the completion of the works vest in an adjoining owner as superfluous land under the Lands Clauses Consolidation Act, 1845, s. 127, merely because, from insufficiency of traffic, or from want of funds, the company cannot immediately apply it to such purposes, although it is in the meanwhile let out to yearly tenants, and applied to purposes, for which it is in its then condition suitable. BETTS *v.* GREAT EASTERN RAILWAY COMPANY - - - C. A. 182

—— Liability for negligence of servant of another railway company - - - 341
See NEGLIGENCE.

RE-ENTRY—Power not applicable to negative covenant - - - - 73
See VENDOR AND PURCHASER.

REFERENCE—Question of account—Breach of covenant - - - - - 198
See PRACTICE. 3.

REPEAL—Effect of repealing part of statute 214
See STATUTE.

REVENUE — *Income Tax (Sched. A.) and Inhabited House Duty—Occupation—Police Superintendent residing at Police Station*—16 & 17 *Vict. c.* 34 (*Income Tax*)—14 & 15 *Vict. c.* 36 (*Inhabited House Duty*).] The appellant, a superintendent of police, lived with his family in a house within the boundary of a police station which included other buildings used for the purposes of the police district. There was a yard to the house, and a wall which divided the appellant's premises from the remainder of the police station, to which a door in the wall afforded access. The front entrance of the house faced the street. The appellant kept the keys of the house, which he had himself furnished, and for the use of which a deduction was made from his salary. He was compelled to live in the house, as that was necessary for the discharge of his official duties; the house was liable to be used for such purposes connected with the police force as the chief constable might direct; and the appellant was liable to be removed from station to station at any time:—*Held*, that the appellant had not such an occupation of the house as to render him liable to pay income tax or inhabited house duty in respect of it. BENT *v.* ROBERTS - - 66

REVENUE—*continued.*

2. —— *Income Tax—Mines and Minerals—Balance of Profits or Gains—Deduction for exhausted Capital*—5 & 6 *Vict. c.* 35, *s.* 100; *Sched. D., Rules* 1, 3; *s.* 159—29 & 30 *Vict. c.* 36, *s.* 8.] A colliery company bought freehold and leasehold coal mines, and raised some of the coal and sold it. At the end of the first year's working, the mines, by reason of the coal gotten during the year, were worth 10,424*l.* less than the price for which they were bought. The company, being assessed to the income tax under Sched. D in respect of the profits of their business as colliery proprietors for that year, claimed to deduct 10,424*l.* for exhausted capital:—*Held*, first, that by virtue of 29 & 30 Vict. c. 36, s. 8, the mines were assessable under Sched. D of 5 & 6 Vict. c. 35, s. 100, and not under Sched. A; secondly, that in estimating "the full amount of the balance of the profits or gains" of the business under the 1st rule of Sched. D, the deduction ought to be made, and that it was not one of the deductions forbidden by the 3rd rule of Sched. D or by s. 159. KNOWLES *v.* MCADAM - - - 23

3. —— *Inhabited House Duty*—14 & 15 *Vict. c.* 36, *s.* 1—*Building occupied for purposes of Trade only—Telegraph Company*—57 *Geo.* 3, *c.* 25, *s.* 1—5 *Geo.* 4, *c.* 44, *s.* 4—32 & 33 *Vict. c.* 14, *s.* 11.] A banking company carried on their business on a part of their premises, and let off the remainder to a telegraph company, with the exception of two rooms occupied by a caretaker, who looked after the whole premises. The banking company having been assessed to the inhabited house duty in respect of the whole building:—*Held* (by Kelly, C.B., and Pollock, B.), that the business of a telegraph company is a trade within the meaning of 57 Geo. 3, c. 25, s. 1, and that as the whole of the premises were occupied for purposes of trade only they were exempt under 32 & 33 Vict. c. 14, s. 11:—*Held*, contrà, by Cleasby, B., that the provisions of 32 & 33 Vict. c. 14, s. 11, apply only to premises occupied for the purposes of trade within 57 Geo. 3, c. 25, s. 1, and not to premises used as offices or counting-houses for any profession, vocation, business, or calling within 5 Geo. 4, c. 44, s. 4; that the business of a telegraph company was not a trade within the meaning of the former Act, and that the premises were not exempt. BANK OF INDIA *v.* WILSON 108

4. —— *Inland—Licence to deal in Gold Plate—Article composed wholly or in part of Gold*—30 & 31 *Vict. c.* 90, *ss.* 1, 3, 5.] The term "gold," as used in 30 & 31 Vict. c. 90, which imposes a duty on licences to trade in gold or silver plate, does not mean pure gold, but a mixture of pure gold and alloy: so that a goldsmith, holding a licence on the lower scale, is liable to a penalty if he sells an article as gold which weighs more than two ounces, though it does not contain two ounces of pure gold. YOUNG *v.* COOK - - 101

RULE—For sheriff to pay money levied—Notice of motion - - - - 237
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—— **Order LV.** - - - - **261**
See PRACTICE. 7.

SALE OF GOODS—*Contract—Goods, Passing of Property in—Bill of Lading, Goods deliverable to Order.*] P. shipped 600 tons of umber upon a vessel chartered for the plaintiff. The bills of lading made the umber deliverable to the order of P. or assigns. The plaintiff insured the umber. A bill of exchange drawn by P. on the plaintiff which had been discounted by the defendants' bank, to whom the bills of lading had been transferred, having been refused acceptance, a second bill was drawn by P. to the order of C. on the plaintiff, and was given to the defendants in exchange for the first bill, upon the terms that the plaintiff should accept and pay the second bill against the delivery of the bill of lading. The umber and the bill of exchange reached their destination at the same time, but the plaintiff declined to accept the bill. The umber was, therefore, entered at the Custom House in the defendants' name. Subsequently the plaintiff tendered the amount of the bill of exchange and demanded the bill of lading, but the defendants refused to give up the bill of lading; the plaintiff offered a guarantee for the freight, which offer was not accepted by the defendants, and they sold the cargo:—*Held*, in an action by the plaintiff for the value of the umber so sold by the defendants, that the property in the umber passed to the plaintiff, and that, therefore, the plaintiff was entitled to recover. MIRABITA *v.* IMPERIAL OTTOMAN BANK - - - **C. A. 164**

SEIZURE—Constructive seizure of goods by sheriff - - - - **174**
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SET-OFF—In action by assignee of chose in action - - - - - **127**
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SETTLEMENT—Derivative - - - **88**
See POOR LAW.

SHERIFF—*Fieri Facias—Poundage—Seizure.*] A sheriff's officer in the execution of a warrant of fi. fa. went with another man to the debtor's house, shewed him the warrant and demanded payment, and told him that in default of payment the man must remain in possession, and further proceedings would be taken; the debtor then paid the sum demanded in the warrant, which included poundage and officer's fee:—*Held*, that there had been seizure upon the fi. fa., and that the sheriff was entitled to poundage. BISSICKS *v.* BATH COLLIERY COMPANY - - **C. A. 174**

2. —— *Side-bar Rule to Return Writ of fi fa.—Interpleader.*] On a levy by a sheriff under a writ of fi. fa. three persons claimed different portions of the goods. The sheriff interpleaded, and three separate orders were made directing that, on payment of certain distinct sums into court by the claimants within seven days, the sheriff should withdraw and issues should be tried; in default of payment he should sell and pay the proceeds into court. One of the claimants paid money into court, and the interpleader issue in his case was set down for trial. The other two abandoned their claims, but the sheriff withdrew from possession:—*Held*, affirming the decision of the Exchequer Division, that the execution creditor, pending an interpleader issue, had no right to the immediate return of the writ. ANGELL *v.* BADDELEY **C. A. 49**

—— Rule to pay money levied—Notice of motion
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SHIP AND SHIPPING—*Authority of the Master to sell Goods damaged on the Voyage—Freight pro ratâ itineris—Warranty by Shipper that Goods were fit to be shipped.*] A master of a vessel cannot at an intermediate port sell goods, which are damaged and cannot be carried to the port of discharge, without communicating with their owner.—Where goods damaged on the voyage are landed at an intermediate port and sold without the assent of their owner, the shipowners are not entitled to freight pro ratâ itineris.—Where the owner of a vessel has an opportunity of examining goods shipped on board of her, no warranty on the part of the owner of the goods can be implied that they are fit to be carried on the voyage. ACATOS *v.* BURNS - - - **C. A. 282**

2. —— *Charterparty—Freight—Ship's Husband.*] The right of a ship's husband to be repaid out of the freight for advances made on account of the ship is a right of lien or retainer and not in the nature of a charge on the freight; and therefore if he is removed from his office by the owners before he is in a position to receive the freight, an assignee of his interest in the freight cannot maintain a claim to it as against the owners.—When an entire ship is in mortgage, in order to defeat the right of the mortgagor to receive the freight, the mortgagee must take possession of her before the completion of her voyage; but where the mortgagor of certain shares is ship's husband, if the mortgagees join with the owners of the other shares in the ship in the appointment of a new ship's husband before the completion of the voyage, the mortgagor loses all right as ship's husband to receive the freight.—In August, 1876,

SHIP AND SHIPPING—*continued.*

R. was mortgagor of certain shares in a vessel, and also was acting as ship's husband, and the defendants were charterers of the vessel for the voyage upon which she was then employed. R. obtained from the plaintiffs a loan of 200*l.*, and by a letter dated the 30th August requested the defendants to pay to the plaintiffs the freight due on the charter. On the 20th of September the mortgagees of R.'s shares and the owners of the other shares appointed E. ship's husband in place of R. Upon the 11th of October the vessel completed her voyage, and upon the 14th began to discharge her cargo; upon the 16th the defendants sent to the plaintiffs a cheque for 200*l.*, which they afterwards dishonoured, E. having claimed the amount of the freight:—*Held*, affirming the judgment of Huddleston, B., that the plaintiffs could not maintain an action to recover the amount of the cheque. Beynon *v.* Godden C. A. 263

SPECIFIC PERFORMANCE—Questions of title *See* Vendor and Purchaser. [73

STAMP—*Order of Charity Commissioners—Appointment of Trustees and Vesting of Property—The Stamp Act*, 1870 (33 & 34 *Vict. c.* 97) *ss.* 8, 78.] An order of charity commissioners, by which new trustees of a charity are appointed and the property of the charity vested in them, is chargeable, under s. 8 of the Stamp Act, 1870, with duty in respect both of the appointment and of the vesting order, and does not come within the proviso to s. 78 as a conveyance or transfer made for effectuating the appointment of a new trustee. Hadgett *v.* Commissioners of Inland Revenue [46

—— Duty on medicines - - - 214
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STATUTE—*Repeal of part—Effect of Repeal—Stamp Duties on Medicines—52 Geo. 3, c. 150—3 & 4 Wm. 4, c. 97, s. 20.*] The statute 52 Geo. 3, c. 150, imposed a stamp duty on a number of articles specifically named in a schedule, and, among others, on "waters, videlicit, all artificial mineral waters, and all waters impregnated with soda or mineral alkali, or with carbonic acid gas and all compositions in a liquid or solid state, to be used for the purpose of compounding or making any of the said waters," and also by a general clause at the end of the schedule on "all other . . . . waters" to be used as medicines made by any person, and by public notice or advertisement held out to the public by the makers, vendors, or proprietors thereof, as beneficial to the prevention, cure, or relief of any disorder or complaint affecting the human body. The statute 3 & 4 Wm. 4, c. 97, s. 20, repealed so much of the schedule to the former Act as is contained in the words commencing "waters, videlicit."—A composition sold in a solid state contained three ingredients, one of which was a medicine, the other two, bicarbonate of soda and tartaric acid, being added to evolve carbonic acid gas when it was dissolved in water; it was advertised by the vendor as a medicine:—*Held*, by the Court of Appeal, Bramwell, Brett, and Cotton, L.JJ., overruling the decision of the majority of the Exchequer Division, that the article was a "water," and was taxable as such by the schedule of 52 Geo. 3, c. 150, and that by the repeal of the schedule so far as it related to "waters" the article did not become taxable under the general clause. Attorney General *v.* Lamplough - C. A. 214

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SUNDAY PROFANATION—21 *Geo.* 3, *c.* 49, *ss.* 1, 4—*Action for Penalties—Judgment obtained by Covin and Collusion no Bar—Covin and Collusion, what is Evidence of.*] The defendants having, on Sunday, the 15th of August, 1875, kept open the Brighton Aquarium as a place of public entertainment, and thereby incurred a penalty under 21 Geo. 3, c. 49, the plaintiff, on the 17th, brought an action to recover the penalty, but omitted to specify in the writ the Sunday in respect of which he was suing. On the 20th of October, R. brought an action against the defendants claiming penalties in respect of the 15th August and all the Sundays intervening between that date and the issue of R.'s writ; and on the 28th of October judgment was signed in R.'s action by default. This judgment the defendants pleaded in bar of the plaintiff's action, and the plaintiff replied that the judgment was obtained by covin and collusion. At the trial of the plaintiff's action, in 1877, it was proved that R.'s action was brought at the request of the defendants, their object being to protect themselves from all actions in respect of the penalties included in R.'s action, and also to obtain, as soon as possible, from the Secretary of State a remission of the penalties under 38 & 39 Vict. c. 80. When R.'s action was brought he did not know of the existence of the plaintiff's action, but he agreed verbally that the defendants might make what use they pleased of his action, and that he would not issue execution or claim penalties. The judge directed the jury that the above circumstances disclosed ample evidence of covin and collusion, and the jury found a verdict for the plaintiff:—*Held*, first, that the judgment in R.'s action was obtained by covin and collusion, and could not affect the rights of third parties; and that the verdict ought not to be disturbed:—Secondly, that independently of covin and collusion, the penalty sued for in the plaintiff's action became a debt to him as soon as the writ was issued, and his right to recover could not be affected by any subsequent action; and that since the plaintiff was in fact suing in respect of the 15th of August, and the

SUNDAY PROFANATION—*continued.*
defendants knew it, the fact of the date not having been specified in the writ was immaterial. Girdlestone *v.* Brighton Aquarium Company 137

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VENDOR AND PURCHASER—*Specific Performance—Underlease—Waiver of Objection to Title—Constructive Notice of Provisions in Original Lease—Qualified Covenant not to assign or underlet without Consent—Clause of Re-entry not applicable to Negative Covenants—Usual Covenant—Covenant not to mow Meadow Land more than once a Year—Clause of Re-entry in case of Bankruptcy, Composition with Creditors, or Execution issued against Lessee—Merger—Reversion.*] Where a parol contract is made for the grant of an underlease subject to a question of title, possession taken with the knowledge and consent of the grantor is not of itself a waiver of an objection to title by the grantee, but it is only evidence of the acceptance of the title, which may be rebutted by other circumstances.—Upon an agreement to grant an underlease the grantee has constructive notice of the provisions of the original lease only when he has had a fair opportunity of ascertaining what they were.—Where a lease provides that the lessee shall not assign or underlet without the consent in writing of the lessor, which, however, is not to be withheld from any assignment or underlease to a respectable and responsible person, it is unnecessary to the validity of an assignment or underlease to a person of that character that the consent of the lessor should be first obtained.—*Semble*, that a power of re-entry, upon the lessee wilfully failing or neglecting to perform any covenant, does not apply to a breach of a negative covenant.—In a lease of a farm a covenant not to mow meadow land more than once a year is not an unusual covenant, so as to excuse an intended assignee from accepting the title. But a power of re-entry in a lease, if the lessee and his assigns become bankrupt, or make a composition with creditors, or if execution should issue against either of them, is unusual, and an intended assignee is not bound to accept an assignment of a lease containing such a covenant.—Where a lessor, being himself a tenant for years, grants to his

VENDOR AND PURCHASER—*continued.*
sub-lessee the residue of his interest from the termination of the existing sub-lease, the grant operates as an interesse termini, and the existing sub-lease does not merge; and a right of re-entry contained in the original lease would still exist and enable the lessor to re-enter for breach of covenant.—*Semble*, where two pieces of land are demised by one lease containing a power of re-entry over both, and afterwards the reversion in one of them is assigned to the lessee, the right of re-entry remains intact over the piece of land of which the reversion remains vested in the lessor. Hyde *v.* Warden - - - C. A. 73

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